82-1582

No._____

reme Court, U.S.
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MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a non-profit collective bargaining association of farmers which claims the right to bargain on a non-pecuniary basis and engage in horizontal price fixing on behalf of its members by reason of an antitrust exemption conferred by §6 of the Clayton Act, 15 U.S.C. §17, and the Capper-Volstead Act, 7 U.S.C. §291, has standing to sue for lost membership dues and fees as antitrust damages pursuant to §4 of the Clayton Act, 15 U.S.C. §15?

2. Whether proof of a relevant geographic market is a necessary element to support a conspiracy to monopolize claim under §2 of the Sherman Act or a non-*per se* conspiracy claim in unreasonable restraint of trade under §1 of the Sherman Act?

3. Whether, under §4 of the Clayton Act:

(a) Attorney's fees awarded to a party who has prevailed on appeal on a portion of its claim should be apportioned to reflect the extent to which it has prevailed;

(b) Expenses of litigation, not specifically identified as "costs" under Fed.R.Civ.P. 54(d) and 28 U.S.C. §1920, are recoverable as "cost of suit"?

LIST OF PARTIES

Pursuant to Rule 21(b), Rules of the Supreme Court, Counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding below:

Associated Milk Producers, Inc., Mid-American Dairymen, Central Milk Producers Cooperative, National Farmers Organization and Associated Reserve Standby Pool Cooperative.

Petitioner Central Milk Producers Cooperative has no parent or subsidiaries and has the following members as affiliates:

Alto Cooperative Creamery
Waupun, Wisconsin

Associated Milk Producers, Inc.,
Mid-States Region
Schaumburg, Illinois

Chaseburg Cooperative
Chaseburg, Wisconsin

Consolidated Badger Cooperative
Shawano, Wisconsin

Golden Guernsey Dairy Cooperative
Milwaukee, Wisconsin

Independent Milk Producers Cooperative
Slinger, Wisconsin

Lake to Lake Dairy Cooperative
Manitowoc, Wisconsin

Manitowoc Milk Producers Cooperative
Manitowoc, Wisconsin

Mid-West Dairymen's Cooperative
Rockford, Illinois

Milwaukee Cooperative Milk Producers
Brookfield, Wisconsin

Outagamie Producers Cooperative
Black Creek, Wisconsin

Pine River Farmers Dairy Cooperative
Merrill, Wisconsin

Wisconsin Dairies Cooperative
Baraboo, Wisconsin

Woodstock Progressive Milk Producers
Woodstock, Illinois

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CENTRAL MILK PRODUCERS COOPERATIVE,
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vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Central Milk Producers Cooperative ("CMPC") respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this matter on August 31, 1982, reversing, in part, the January 29, 1981 judgment of the district court in favor of CMPC, Associated Milk Producers, Inc. (AMPI) and Mid-America Dairymen, Inc. (Mid-Am).

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 1a)* is reported at 687 F.2d 1173. The opinion of the district court (App. at 67a) ordering judgment against respondent on its antitrust claims and in favor of petitioner is reported at 510 F.Supp. 381 (W.D. Mo. 1981). The order of the Court of Appeals awarding costs and attorneys fees on appeal is reported at 696 F.2d 1210 (8th Cir. 1983) and appears in Petitioner's Appendix hereto (P. App. at 3a).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 31, 1982. The Court of Appeals denied petitioner's timely petition for rehearing *en banc* and suggestions for rehearing on November 10, 1982** (App. at 376a). By this Court's Order of February 25, 1983 the time for filing this petition was extended to March 25, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this petition include sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, sections 4 and 6 of the Clayton Act, 15 U.S.C. §§15, 17 and section 1 of the Capper-Volstead Act, 7 U.S.C. §291. The pertinent portions appear in Petitioner's Appendix hereto (P. App at 1a).

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* The reference "App." is to the Appendix to the Petition for Writ of Certiorari filed by National Farmers Organization, Inc. in Docket No. 82-1324 on February 8, 1983.

** Judge Ross would have granted the petition.

STATEMENT OF THE CASE

This case presents the anomaly of a national organization of farmers devoted to political action and collective price fixing being granted the right to recover antitrust damages for lost membership dues because of defendants "monopolizing" conduct without ever having defined the "market" that defendants are charged with conspiring to monopolize. The case also raises the question whether the antitrust laws are intended to provide a remedy for a speculative membership loss which attenuates respondent's power to fix prices or achieve the monopoly power which it seeks.

The Proceedings Below

On March 12, 1971 Mid-Am, a cooperative marketing association of dairy farmers, filed an antitrust treble damage action against the National Farmers Organization (NFO) alleging that NFO violated §1 of the Sherman Act by promoting a group boycott of Mid-Am and engaging in illegal price fixing in the sale of its members' raw milk. 687 F.2d at 1181; App. at 6a. Mid-Am claimed that NFO was not entitled to the antitrust exemptions conferred by §6 of the Clayton Act and the Capper-Volstead Act because NFO was not a bona fide association of farmers within the meaning of those acts. 687 F.2d at 1183; App. at 11a. NFO filed an antitrust counterclaim against Mid-Am and joined AMPI and thereafter CMPC and Associated Reserve Standby Pool Cooperative (ARSPC), three dairy farmer cooperatives, as additional counterclaim defendants.[1]

The NFO counterclaim alleged that CMPC, AMPI, ARSPC and Mid-AM monopolized, attempted to monopolize and con-

[1] Mid-Am's case against NFO (Phase I) was separately tried to the district court. *See* 510 F.Supp. at 385; App. at 71a. NFO's counterclaim is referred to as Phase II of the litigation.

spired to monopolize the marketing of raw milk in violation of the Sherman Act in "a ten state region" of the Midwest or "ten federal order markets therein" [2] (687 F.2d at 1191, App. at 26a) by conduct designed to depress the price received by NFO members for their raw milk and to stifle NFO's growth by depriving its members of access to milk buyers. 687 F.2d 1193-94; App. at 31a-33a.

As to Mid-Am's "Phase I" claim, the district court concluded that NFO's activities did not constitute price fixing and, therefore, found it unnecessary to reach the merits of NFO's Capper-Volstead exemption defense. 687 F.2d at 1183; 510 F.Supp. at 423-426; [3] App. at 11a, 150a-55a. The "Phase II" counterclaim, tried to the district court over an eighteen month period, resulted in entry of judgment dismissing NFO's §§1 and 2 Sherman Act claims on the basis of the court's "ultimate determination that . . . NFO failed to carry the burden of proof in regard to all Phase II issues necessary to establish liability on the part of counterclaim defendants." 510 F. Supp. at 434; App. at 173a. The district court found specifically that NFO failed to prove a properly defined relevant geographic market or that the defendant cooperatives monopolized, attempted to monopolize or conspired to monopolize the marketing of milk in any properly defined market. 510 F. Supp. at 502-03; App. at 318a-319a.

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[2] A "federal order market" is a defined geographic area in which the marketing of milk is regulated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937. 7 U.S.C. §601 *et seq.* *See* 510 F.Supp. at 442; App. at 190a.

[3] The district court noted, however, that in view of this Court's holding in *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978) "had we reached and decided the merits of the question of [NFO's Capper-Volstead exemption], we would have rejected NFO's Capper-Volstead [defense]". 510 F.Supp. at 426; App. at 155a.

Though petitioner had urged from the outset that NFO lacked standing to sue for alleged "price reduction" damages suffered by its members or loss of membership dues,[4] the district court concluded that it was unnecessary to reach the question of whether NFO was injured in its business or property or whether it had standing to maintain the action. 510 F.Supp. at 503; App. at 320a.

On appeal, the Eighth Circuit affirmed the district court's dismissal of Mid-Am's Phase I claim but on different grounds. The Eighth Circuit concluded that NFO engaged in horizontal price-fixing but held that its price-fixing on behalf of the members was exempt conduct under the Capper-Volstead Act. 687 F.2d at 1183-84; App. at 11a-12a.

Dismissal of NFO's Phase II claim was affirmed in part and reversed in part. Though the Eighth Circuit concluded, contrary to the district court, that CMPC, Mid-Am and AMPI conspired to eliminate NFO as a competitor in the marketing of raw milk by conduct unprotected by the Capper-Volstead Act (687 F.2d at 1179; App. at 3a), it affirmed the district court's dismissal of NFO's actual and attempted monopolization claims because of NFO's failure to show that the defendant cooperatives possessed "monopoly power in a properly defined market or sub-markets." [5] 687 F.2d at 1192; App. at 29a.

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[4] NFO's damage claim of $14,064,068.76 included $12,851,000 of "lost penetration damages" attributable to loss of member dues and "checkoff" and approximately $1,213,000 of "price reduction damages" allegedly suffered by its members. 510 F. Supp. at 435, n. 27; App. at 174a; *see* 687 F.2d at 1208-09; App. at 62a.

[5] "The burden to show monopoly power or 'dangerous probability' of it . . . is on NFO. We cannot say it was clearly erroneous for the district court to find that NFO's statistical evidence was not sufficiently well defined to support its claims of actual and attempted monopolization. Accordingly, we affirm the dismissal of such claims." 687 F.2d at 1192; App. at 29a.

As to the conspiracy to monopolize claim, however, the Eighth Circuit reversed. The Circuit Court held that a §2 Sherman Act conspiracy to monopolize claim does not require proof of a relevant market because the essential elements of the claim "are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce.' *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir 1971)." 687 F.2d at 1181-82; App. at 8a.

As to petitioner's argument that NFO lacked standing to maintain the action (which the district court failed to address), the Eighth Circuit agreed that NFO cannot recover "price reduction" damages suffered by its members (687 F.2d at 1208; App. at 62a) but held that NFO is entitled to recover lost membership dues and fees because such losses "represent direct injury to NFO in its 'business or property'." *Id.* at 1209; App. at 63a.

The Parties

Respondent NFO is a nationwide organization of farmers incorporated as a non-stock, non-profit membership corporation under Iowa law. Originally organized in 1955 as a protest movement against federal agricultural policy, it amended its articles of incorporation in 1957 to add as an object and purpose collective bargaining "on a non-pecuniary basis for prices, terms and conditions of sale" of its members' farm products. 510 F.Supp. at 388; 687 F.2d at 1180; App. at 5a, 78a. NFO's members produce a general array of farm products including milk, livestock and grain. As expressed in its By-laws, NFO's avowed purpose and principal aim is "to unite into one organization . . . all farmers engaged in the production of agricultural commodities" (510 F.Supp. at 388; App. at 78a) in order to exercise sufficient market power to raise

the price of its members' farm products above the level that would obtain in a competitive market. 687 F.2d at 1180; App. at 4a-5a. NFO's announced objective is to "block or unite enough production . . . under control of [its] members so, that those members can . . . name their price, and if the price wasn't paid, to hold the production." 510 F.Supp. at 408; App. at 118a. To obtain the price it desires, NFO's bargaining strategy has included picketing and "holding actions" comparable to a strike in the labor field. 510 F.Supp. at 389; App. at 80a.[6]

NFO receives member dues and "checkoff" fees forwarded to it from the proceeds of the sale of its members' farm products. In the case of milk such proceeds are paid by the buyer to an "NFO Dairy Trust" which, in turn, deducts and remits to NFO such dues and "checkoff" as the member has authorized to defray NFO's collective bargaining expenses. 510 F.Supp. 396, 407; *see* 687 F.2d 1184, 1208-09; App. at 94a; 13a, 61a-62a.

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[6] Respondent NFO does not itself sell any farm commodity. 510 F.Supp. at 389, 401; App. at 79a, 104a. "The stipulated facts show that NFO . . . gives collective bargaining and marketing services exclusively to its members in connection with their agricultural commodities." 687 F.2d at 1184; App. at 13a. The stipulated facts also show that NFO is "forbidden [by its By-Laws] to enter into, or engage in any business in behalf of or in the name of the organization, of the sort commonly engaged in by cooperatives for profit" or from distributing any income to its members. 510 F.Supp. 388-89; 687 F.2d at 1184, 1208; App. at 79a; 13a. Hence, NFO is organized in such a way that it has no earnings or net income from the sale of its members' milk. 510 F.Supp. at 389; App. at 79a. In 1957, NFO was ruled to be exempt from federal income tax as a non-profit membership organization pursuant to I.R.C. §501(c)(5).

Mid-Am and AMPI are both cooperative associations of dairy farmers engaged in collectively marketing the milk of their dairy farmer members to "handlers" [7] who operate fluid milk bottling plants throughout the midwestern region of the United States.

Petitioner CMPC is a "common marketing agent" [8] for 15 dairy cooperatives whose dairy farmer members, located principally in Wisconsin, supply milk solely to handlers regulated under Federal Milk Order No. 30 (7 C.F.R. Part 1030) which regulates the handling of milk in a geographic area described as the "Chicago Regional Marketing Area". 7 C.F.R. §1030. 687 F.2d at 1180, 1194; App. at 5a-6a, 32a.

REASONS FOR GRANTING THE WRIT

I. In Ruling That Respondent Has Standing To Sue For Lost Membership Dues And Fees The Eighth Circuit Follows A Rule Of Antitrust Standing That Has Been Repudiated By This Court And Other Courts of Appeal.

The Eighth Circuit held that respondent NFO has standing under §4 of the Clayton Act, 15 U.S.C. §15, to recover lost membership dues and fees because it "was a direct target of

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[7] The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601, *et seq.*, authorizes the Secretary of Agriculture to regulate "handlers" of certain agricultural commodities, including milk, under a federal marketing order.

[8] The Capper-Volstead Act, 7 U.S.C. §291 provides in part that "[P]ersons engaged in the production of agricultural products . . . may act together in associations . . . in collectively processing . . . and marketing . . . such products of persons so engaged. Such associations may have marketing agencies in common; and . . . may make the necessary contracts and agreements to effect such purposes. . . ."

the unlawful conspiracy." 687 F.2d at 1209; App. at 63a. That conclusion ignores the teaching of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as more fully articulated by this Court last term in *Blue Shield of Virginia v. McCready*, —— U.S. ——, 102 S.Ct. 2540 (1982), and more recently in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. ——, 51 U.S.L.W. 4139, 4144 (February 22, 1983), that more must be shown for recovery under §4 than the plaintiff was the "target" of defendant's unlawful conduct. Notwithstanding the broad remedial purpose of §4, this Court noted in *McCready* that "our cases have acknowledged two types of limitations on the availability of the §4 remedy to particular classes of persons and for redress of particular forms of injury.", *id.* at 2545-46, limitations derived from *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), *Illinois Brick* and *Brunswick*.

A. The Eighth Circuit's Opinion Permits §4 Clayton Act Damages To Be Recovered For The Kind Of Abstract Injury Barred By Controlling Decisions Of This Court.

In *Illinois Brick*, this Court held, on the basis of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) that indirect purchasers were barred from recovering damages under §4 of the Clayton Act because of the "evidentiary complexities and uncertainties" (*Illinois Brick, supra*, 431 U.S. at 732) in determining the extent to which an illegal overcharge was passed on through the distribution

chain.[9] In *McCready*, the Court again noted that the "feasibility and consequences of implementing particular damage theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under §4." 102 S.Ct. at 2546-47, n. 11.

The Eighth Circuit's failure to consider whether NFO's "claim rests at bottom on some abstract conception or speculative measure of harm" (*ibid.*) collides squarely with the rationale of *Illinois Brick*, applied in other contexts, barring §4 Clayton Act claims based on a "tenuous and speculative character of the relationship between the alleged antitrust violation and [NFO's] alleged [loss of membership dues]", *Associated General Contractors, supra*, 51 U.S.L.W. at 4146, which the judicial system cannot effectively accommodate. *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 584-85 (3d Cir. 1979); *GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1232-33 (S.D.N.Y. 1981).

NFO is more than a collective bargaining association. It is a political and social action organization. 510 F.Supp. 388, 454; App. at 78a, 215a. Dairy farmers may leave or refrain from joining NFO because of disagreement with its political or economic policies rather than "by reason of" defendants alleged anticompetitive conduct. Dairy farmers' reasons for

[9] "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economists hypothetical model,' 393 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick, supra*, at 731-32; *see id.* at 741; *see also Hawaii v. Standard Oil, supra*, 405 U.S. at 262-63, n. 14.

joining or leaving respondent are as varied as their number.[10] To establish a "causal link" between respondent's lost membership dues and fees and defendants' alleged anticompetitive conduct would require probing of the minds and "actions of innumerable individual decision-makers," *Reading Industries, supra*, 631 F.2d at 13, among the dairy farmers in the ten state area of the Midwest in which respondent claims its membership growth was stunted to determine why, as the record herein discloses, (1) some producers market their milk through the defendant cooperatives but continue to pay dues to NFO; (2) some producers continue to join NFO despite defendants' alleged anticompetitive conduct; (3) some producers joined as members of NFO though they received a lower price for their milk; (4) some producers remained as members of NFO but refused to pay their dues; (5) some producers market grain or livestock through NFO but their milk through defendants or; (6) why the investment in and loyalty of some producers to defendant cooperatives acted as a bar to repondent's solicitation efforts. *Cf. Associated General Contractors, supra*, 51 U.S.L.W. at 4146.[11]

While the commodity "milk" may constitute a relevant product market capable of being restrained or monopolized,

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[10] NFO's principal dairy operative in the Midwest testified that the "pay price" received by NFO's members is "just one of" many considerations "in terms of . . . where they sell their milk" but "it is not the main important factor." He testified that other factors of importance are "the goals and aspirations of the organization that they belong to, the loyalty that they have to the organization, the feeling and relationship that they have with individuals within the organization . . . market style . . . the overall strategy in terms of the farmer's total income, not strictly his dairy income. . . . I think of an organization that is involved in an all-commodity has an effect on the producer as to whether he ships with one group or another" (Tr. at 5465).

[11] Justice Stevens noted that because the Union's alleged injury "may have been produced by independent factors, the Union's damages claim is . . . highly speculative." 51 U.S.L.W. at 4146.

dairy farmer membership in a politically active national farm organization is another matter. A dairy farmer's organizational affiliation is not a "product" capable of being restrained or monopolized. The link between respondent's unrealized growth in membership and defendants' conduct is based on "conjectural theories of injury and attenuated economic causality", *Reading Industries, supra*, at 14, that are fraught with too many "evidentiary complexities and uncertainties" (*Illinois Brick, supra*, at 732) to support a claim for recovery of lost membership dues and fees under §4 of the Clayton Act.

B. The Eighth Circuit's Decision Holding That Lost Membership Dues Are Recoverable As Antitrust Damages Under §4 Of The Clayton Act Is In Conflict With The Holding Of *Brunswick, Associated General Contractors* And The Decisions Of Other Circuits.

NFO is organized for the purpose of acquiring membership sufficient to enable it to exercise the power to fix prices of the commodities sold by its members. 687 F.2d at 1180, 1183-84; App. at 5a, 11a-12a. The Eighth Circuit held, nonetheless that NFO suffered compensable *antitrust* damages when its price-fixing power was eroded by membership losses "attributable to defendants' unlawful conduct", 687 F.2d at 1209; App. at 63a, because "NFO, as a competitor, was a direct target of the unlawful conspiracy." *Ibid.*

Such a result stands the Sherman Act on its head and collides squarely with the holding in *Brunswick Corp. v. Pueblo Bowl-O-Mat, supra*, "that for [respondent] to recover treble damages . . . [it] must prove more than injury causally linked to an illegal presence in the market. [Respondent] must prove *antitrust* injury which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Id.* at 489 (emphasis in original). NFO's claim of lost membership dues re-

sulting from members "who stopped marketing through NFO", 687 F.2d at 1209; App. at 62a, does not describe "competitive"[12] injury from an unlawful restraint of the market for the sale of milk. It describes an indirect injury in the "membership market" for the sale of NFO's collective bargaining services the purpose of which is to fix above a competitive level through collective action the prices to be paid to respondent's members for the sale of their farm commodities. *Cf. Associated General Contractors, supra*, 51 U.S.L.W. at 4145, nn. 41, 42 and text accompanying. To award antitrust damages arising from a weakening of respondent's price-fixing power would be "inimical to the purposes of [the antitrust laws]", *Brunswick Corp., supra*, at 488, for such "injury [is] not of 'the type that the [Sherman Act] was intended to forestall,' *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)." *Id.* at 487-88.

NFO's claimed loss of membership dues is but an indirect derivative result of whatever competitive injury NFO's *members* may have suffered directly in the sale of their milk as a result of defendant's alleged conspiracy. But it is not enough that NFO alleges "a causal connection between an antitrust violation and harm to [NFO] and . . . that the defendants intended to cause that harm." *Associated General Contractors, supra*, 51 U.S.L.W. at 4144. The "appropriate . . . focus [is] on the nature of plaintiff's alleged injury." *Ibid.* More important even than "the physical and economic nexus between the alleged violation and the harm to the plaintiff", *McCready, supra*, at 2548, is the concern of "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendants' conduct

[12] NFO is forbidden by its By-laws and tax exempt status under §501 (c)(5) of the Internal Revenue Code from engaging in business. *See* n. 6, *supra*.

unlawful and in providing a private remedy under §4."[13] *Ibid.* To award antitrust damages for a loss that diminishes respondent's ability to achieve monopoly power or to fix prices is fundamentally at odds with "the general principal that treble-damages recoveries should be linked to the pro-competition policy of the antitrust laws", *id.* at 2550, and "authorize[s] damages for losses which are of no concern to the antitrust laws." *Brunswick, supra,* 429 U.S. at 487.

There is no danger that denial of a treble damage remedy to plaintiffs such as NFO for lost membership dues and fees will permit antitrust violators to go unpunished or leave their victims without a remedy.[14] In addition to governmental enforcement agencies, there are other classes of plaintiffs more directly injured by defendants' alleged competitive restraints "whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement", *Associated General Contractors, supra,* 51 U.S.L.W. at 4145-46, and

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[13] While respondent's fundamental purpose of organizing farmers so as to eliminate competition among them in selling their commodities may be protected by §6 of the Clayton Act and the Capper-Volstead Act from the sanctions of the Sherman Act, it does not follow that respondent is entitled to the affirmative protections of that Act and the remedies of §4 for "injury" which affects only its "organizational and representational activities." *Associated General Contractors, supra,* 51 U.S.L.W. 4141, n. 10 and text accompanying; *see also, id.* at 4145. Petitioner does not contend that a Capper-Volstead cooperative may not recover under §4 for direct injury in the form of lost earnings from an unlawful restraint in the *market* for the sale of *its products*. But that is not this case.

[14] The Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-2307 affords a remedy in the form of damages and attorneys fees to "[a]ny person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, any provision of section 2303" of the Act which describes "prohibited practices". Among the "prohibited practices", the section includes the conduct charged by NFO, against the defendants AMPI and Mid-Am in their capacity as "handlers" subject to the Act's prohibitions.

whose losses can more efficiently be remedied by our judicial system. Neither the Justice Department[15] nor private treble damage plaintiffs[16] have shown any reluctance to monitor, control, sanction and deter antitrust violations by dairy cooperatives. Moreover, there was nothing to preclude NFO's members who are the direct competitive injury claimants from suing as a class for such damages as NFO seeks to recover on their behalf.[17] No policy objective of the antitrust laws is served by expanding the availability of the §4 damage remedy to allow membership dues recovery to an entity which has as its principal aim "to unite into one organization . . . all farmers engaged in the production of agricultural commodities". 510 F.Supp. at 388, App. at 78a.

C. The "Standing" Question Presented By This Petition Raises Issues Of Importance In The Enforcement Of The Antitrust Laws Beyond The Interests Of The Parties In This Case.

The question of who may sue for treble damages under §4 of the Clayton Act has been "characterized by doctrinal confu-

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[15] *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939); *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981); *United States v. AMPI*, 394 F.Supp. 29 (W.D. Mo. 1975); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. ¶61,508 (W.D. Mo. 1977).

[16] *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981); In re *Midwest Milk Monopolization Litigation, M.D.L. No. 83*, 379 F.Supp. 989, 991 (J.P.M.L. 1974); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F.Supp. 608 (M.D. Ga. 1981); *see also* cases cited 687 F.2d at 1182; App. at 9a.

[17] NFO's Phase II suit was brought, originally on behalf of a class consisting of all farmers in the United States. The class was later narrowed to all dairy farmers in the United States. NFO failed to pursue certification of the class after its original motion to certify was denied "without prejudice" by the district court.

sion", *In re Industrial Gas Litigation*, 681 F.2d 514, 515 (7th Cir. 1982), which *McCready* and *Associated General Contractors* do not fully resolve. While the Court's opinion in *McCready* cites with apparent approval the expansive language of *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 659-660 (1961) that "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires", *McCready, supra*, 102 S.Ct. at 2545, n. 9, the decision acknowledges "two types of limitation on the availability of the §4 remedy to particular classes of persons and for redress of particular forms of injury." *Id.* at 2545-46.[18]

In holding that the plaintiff in *McCready* had standing to recover damages, the Court relied, in part, on the "policies identified in *Hawaii* and *Illinois Brick* [which] focused on the risk of duplicate recovery. . . ." *McCready, supra* at 2546. The Court relegated to a "subordinate" status, *id.* at 2546-47, n. 11, as the basis for the decision in *Illinois Brick*, "the evidentiary complexities and uncertainties" of proof, *Illinois Brick, supra*, 431 U.S. at 732, which the Court in *Illinois Brick*, however, described as the "principal basis for decision in *Hanover Shoe*." *Id.* at 731.

Several lower courts have read *Illinois Brick* to deny standing to plaintiffs who assert speculative theories of causation and damages that would mire the courts "with massive evi-

[18] In view of the acknowledged limitation barring the availability of the §4 remedy to the "indirect purchaser" class described in *Illinois Brick v. Illinois*, even though such persons suffer "injury", there would appear to be some question whether the reach of the Sherman Act and the §4 remedy extends to "'all who are made victims of the forbidden practices by whomever they may be perpetrated.' *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 . . . ." *McCready, supra*, 102 S.Ct. at 2545. *See, Illinois Brick Co., supra*, 431 U.S. at 749 (Brennan J. dissenting).

dence and complicated theories." *Hanover Shoe, Inc., supra,* 391 U.S. at 493. *See, e.g., Reading Industries, Inc. v. Kennecott Copper Corp., supra*; *Mid-West Paper Products v. Continental Group, supra*; *GAF Corp. v. Eastman Kodak Co., supra*; *Liang v. Hunt,* 477 F.Supp. 891, 897 (N.D. Ill. 1979). *But see In re Beef Industry Litigation,* 600 F.2d 1148, 1166 n. 24 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980); *In re Bristol Bay, Alaska Salmon Fishery Antitrust Litigation, MDL No. 249,* 530 F.Supp. 36 (W.D. Wash. 1981).

Because this case presents a typical example of "a claim [which] rests at bottom on some abstract conception or speculative measure of harm" rather than "tangible economic injury", *McCready, supra,* at 2547 n. 11, it affords the Court a vehicle to develop further, for the instruction of the lower courts and the antitrust bar, the role that "insuperable difficulty" of proof, *Illinois Brick, supra* at 725 n. 3 (quoting *Hanover Shoe*) will have in deciding questions of standing under §4. To establish that NFO has lost or failed to attract members by reason of defendants' conduct would require an inquiry into the basis for the associational preferences of some 100,000 dairy farmers who produce milk in a ten-state area of the Midwestern United States[19] in which respondent claims its membership growth was stunted by defendants' conduct. Nothing approaching a "reasonable estimate of the cause of injury and of its amount", *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946), is possible save only by resort to an examination of each producer in the region to determine which of them refrained from associating as members of respondent by reason of defendants' unlawful conduct—by resort, that is, to the

[19] *Milk Production,* Crop Reporting Board, Statistical Reporting Service, United States Department of Agriculture, February, 1983, p. 20.

kind of "massive evidence and complicated theories" rejected in *Hanover Shoe, supra*, 392 U.S. at 493.[20]

This case also affords the Court an opportunity to further develop the concept of "antitrust injury" as an aspect of standing under §4 of the Clayton Act. Notwithstanding the teaching of *Brunswick* that §4 is intended to remedy only injury of the kind that the antitrust laws were designed to forestall, some courts have read the case narrowly,[21] while others have given *Brunswick* a more expansive reading as merging the requirements of "antitrust injury" with the general concept of standing as a prerequisite to suit under §4.[22] The writ should be granted to instruct the lower courts that §4 of the Clayton Act does not provide a remedy for losses which are unrelated to the procompetition policy of the antitrust laws.

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[20] If NFO lacks standing to recover damages for the *direct* competitive injury suffered by its members, as the Eighth Circuit holds, it is patent that NFO may not recover for *indirect* injury attributable to loss of membership dues and fees. NFO's claim that dues payments were affected adversely because dairy farmers were reluctant to join due to defendants' conduct is too remote, indirect and speculative to support standing under §4. *Associated General Contractors*, 51 U.S.L.W. at 4145 n. 46. *See Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1153 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[21] *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 888-89 (5th Cir. 1982), *judgment vacated*, —— U.S. ——, 51 U.S.L.W. 3627 (February 28, 1983). This Court remanded the case "for further consideration in light of" *Associated General Contractors*. *Id.* at 3633.

[22] *See, e.g., Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

II. The Eighth Circuit's Decision Holding That Proof Of A Relevant Geographic Market Is Not A Necessary Element In A "Rule Of Reason" Case Under §1 Of The Sherman Act Or Conspiracy To Monopolize Under §2 Is In Conflict With The Decisions Of This Court And Other Circuits.

Section 2 of the Sherman Act prohibits monopolization and attempts and conspiracies to monopolize. The Eighth Circuit affirmed the district court's dismissal of respondent's actual and attempted monopolization claims for failure to properly define a relevant geographic market or submarket, 687 F.2d 1192; App. at 29a, but reversed the dismissal of respondent's conspiracy to monopolize claim on the ground that "relevant market is not a necessary element of such a claim because actual attainment or 'dangerous probability' of monopoly power are not at issue," 687 F.2d at 1193; App. at 30a. Dismissal of the actual and attempted monopolization claims was mandated by the decisions of this Court and the prevailing rule in all circuits that definition of a proper "relevant market" is an essential element of an actual monopolization[23] and, except in the Ninth Circuit, an attempt to monopolize case.[24]

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[23] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[24] "An attempt to monopolize claim generally requires the specific intent to monopolize and a showing of a 'dangerous probability' of success, the latter of which is also examined by reference to the offender's share of the relevant market. *See, e.g., Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 . . . (1965); *Agra Shell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 285-287 (8th Cir.), *cert. denied*, 414 U.S. 1022 . . . (1973)." 687 F.2d at 1181; App. at 7a, (footnote omitted). *Accord, George R. Whitten, Jr. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *Dimmitt Agri Industries v. CPC Intern. Inc.*, 679 F.2d 516, 525-26 (5th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270

To hold unlawful under §2 of the Sherman Act joint efforts to pursue an end which, because of the absence of market power would be deemed lawful, is to defy logic and "the language in the controlling statute." *Associated General Contractors, supra*, at 4142. There is nothing in the language of §2 that would permit it to be read to require relevant market proof in actual and attempted monopolization cases but to dispense with such proof in a conspiracy case. The petition should be granted to resolve the question whether "conspiracy to monopolize" under §2 of the Sherman Act is nothing more than an "attempt to monopolize" involving more than one actor. *United States v. Paramount Pictures*, 334 U.S. 131, 171 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 785, 809 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 392, 398 (1905). If proof of a relevant market is an essential element in a §2 attempt case involving single firm conduct, there is no principled basis for dispensing with the requirement in a §2 conspiracy case.

A. The Eighth Circuit's Holding That Conspiracy To Monopolize Under §2 Of The Sherman Act Requires Proof Only Of A Concerted Specific Intent To Monopolize Which Affects "Some Appreciable Part Of Interstate Commerce" Is In Conflict With Decisions Of This Court And Other Circuits.

The Eighth Circuit holds that proof of a relevant market is not a necessary element of a §2 conspiracy claim "because

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(7th Cir. 1981), *cert. denied*, 102 S.Ct. 1277 (1982); *but see Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) and *compare, ALW, Inc. v. United Airlines, Inc.*, 510 F.2d 52, 57 (9th Cir. 1975); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

the essential elements of a Section 2 conspiracy claim are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce' ", 687 F.2d at 1182; App. at 8a, citing *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971) and *United States v. duPont de Nemours & Co.*, 351 U.S. 377, 395 n. 23 (1956). While *Consolidated Laundries* does so hold, it has not been followed in the Second Circuit[25] and is in square conflict with "the better reasoned view", 3 J. Von Kalinowski, *Antitrust Laws and Trade Regulation*, §9.02[4], adopted in the Third, Fourth, Fifth, Eleventh and District of Columbia Circuits requiring proof of relevant market in a §2 conspiracy case.[26]

Reliance on *duPont*, as the basis for dispensing with relevant market proof in a conspiracy to monopolize case is misplaced. *Becker v. Safelite Glass Corporation*, 244 F.Supp. 625, 637 (D. Kan. 1965); *United States v. Johns-Manville Corpora-*

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[25] *Karlinsky v. New York Racing Association, Inc.*, 517 F.2d 1010, 1012 (2d Cir. 1975); *cf. Hudson Valley Asbestos Corp. v. Tougher H&P Co., Inc.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

[26] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153-54 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1715 (1982); *V & L Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651-52 (E.D. Pa. 1975), *aff'd without opinion*, 565 F.2d 154 (3d Cir. 1977); *Weiss v. York Hospital*, 548 F.Supp. 1048, 1056 (M.D. Pa. 1982); *United States v. Johns-Manville Corp.*, 231 F.Supp. 690, 699-700 (E.D. Pa. 1963); *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F.Supp. 143, 153 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *American Football League v. National Football League*, 205 F.Supp, 60, 64-65 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963); *Sulmeyer v. Coca-Cola Company*, 515 F.2d 835, 850-51 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Bill Beasely Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977).

tion, 231 F.Supp. 690, 699 (E.D. Pa. 1964).[27] In *Lessig v. Tidewater Oil Co.*, 327 F.2d 594 (9th Cir.), *cert denied*, 377 U.S. 993 (1964) the Ninth Circuit similarly relied on the *duPont* footnote 23 as the basis for its holding that proof of relevant market is not essential in an attempt *or* conspiracy to monopolize case. *Id.* at 474. But as explained in *Becker* and *Johns-Manville*, in the cases cited by the Court in the *duPont* footnote, it was observed only that "scope of the market was not in issue", not that relevant market proof is not essential in an attempt or conspiracy to monopolize case. *Becker, supra*, at 637.[28]

United States v. Consolidated Laundries, supra, on which the Eighth Circuit also relies as to the basis for dispensing with proof of relevant market in a §2 conspiracy case, held that the government's failure to prove dangerous probability of achieving monopoly power in a relevant market did not vitiate a conviction under §2 of the Sherman Act for conspiracy to monopolize because §2 makes it unlawful

> to conspire to monopolize "any part" of interstate commerce, without specifying how large a part must be affected. Hence, it is enough if some "appreciable part of interstate commerce is the subject" of the conspiracy. *United States v. Yellow Cab Co.* 332 U.S. 218, 225-226 . . . . (291 F.2d at 573).

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[27] In *Johns-Manville*, the district court rejected the Government's reliance on the *duPont* footnote (cited here by the Eighth Circuit) to support an argument that proof of a relevant market was immaterial in a conspiracy to monopolize case, noting that "[t]o adopt the Government's position would be to disregard the approach of [decisions in the] Supreme Court and the language concerning relevant market in such recent decisions as *International Boxing Club of New York v. United States*, 358 U.S. 242, 249-251 (1959). . . ." *Id.* at 699.

[28] As the *Becker* court pointed out, "we do not read *duPont* as justifying such a statement; nor do we read any of the cases cited in the *duPont* footnote as justifying such a statement." *Id.*

Accord, Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir. 1975); *United States v. National City Lines, Inc.*, 186 F.2d 562, 573 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

But the "appreciable part of commerce" test was invoked in *Yellow Cab* to determine that the jurisdictional reach of the Sherman Act extended to an area involving less than the entire United States, not to dispense with the requirement of market definition in §2 cases. *United States v. Columbia Steel Co.*, 334 U.S. 495, 519-520 (1948).[29] Any notion that the "any part of . . . trade or commerce" language of §2 may be read to embrace any "appreciable part of commerce", whether constituting an economic market or not, was laid to rest in *duPont, supra*, at 404 and *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). *See* 3 Areeda & Turner *Antitrust Law*, ¶¶811, 833c. *See also, The Relevant Market Concept In Conspiracy To Monopolize Cases Under Section 2 of the Sherman Act*, 44 U. Chi. L. Rev. 805, 809 (1977).[30]

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[29] As explained by the Court in *Columbia Steel*: "We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. In *United States v. Yellow Cab Co.*, 332 U.S. 218, we sustained the validity of a complaint which alleged that the defendants had monopolized the cab operating business in four large cities. . . ." *Id.* at 519-20. *See id.* at 521-522.

[30] Commenting on the Second Circuit's reliance in *United States v. Consolidated Laundries Corp.* on the "any part of trade or commerce" discussion in *Yellow Cab*, the author notes:

> This rationale is wholly unpersuasive. The "any part" language of section 2 is applicable to all three of the enumerated offenses. If the "any part of the trade or commerce" language is held to

B. In Holding That Business Conduct May Be Condemned As "Unreasonable" In The Absence Of A Defined Market, The Court Below Has Unsettled And Confused The Settled Course Of Decisions In §1 Non-*Per Se* Cases.

The Eighth Circuit's holding that "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade", 687 F.2d at 1193; App. at 30a, notwithstanding the absence of relevant market definition, is in conflict with decisions of this Court, and every circuit that has considered the question.[31] *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 615 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). As explained by the Court in *Columbia Steel Co.*, in order to judge the reasonableness of an alleged restraint in §1 non-*per se* case:

> It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. . . . In determining what constitutes unreasonable restraint, . . . we look . . . to the percentage of business controlled, the strength of the remaining competition . . . and other characteristics of the market. *Id.* at 527.

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obviate the need for market definition in section 2 conspiracy cases, a similar conclusion would appear to be compelled for actual and attempted monopolization cases. . . . The relevant market requirement derives not from the "any part" language of section 2 but rather from the term "monopolize".

Id. at 809.

[31] *See, e.g., Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *American Motors Inn, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1247-48 (3d Cir. 1975); *Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274-76 (9th Cir. 1975); *TV Signal Co. of Aberdeen v. American Telephone and Telegraph*, 617 F.2d 1302, 1309, n. 8 (8th Cir. 1980) ("where the Rule of Reason governs in §1 cases proof of relevant market is necessary to demonstrate the unreasonableness of the restraint.")

The effect of the Eighth Circuit's decision is to convert the Sherman Act into a catchall remedy to reach "unfair" or "business tort" conduct contrary to this Court's admonition that to amount to an unreasonable restraint of trade, "predatory" conduct must have an effect greater than its effect upon a plaintiff's business because "the antitrust laws . . . were enacted 'for the protection of *competition* not *competitors*.'" *Brunswick Corp., supra*, at 488 (emphasis in the original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

The anamolous result of the Eighth Circuit's analyses is thus brought full circle. If "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade", it is illogical and incongruous to hold that the relevant market definition that this Court and all circuits require in a non-*per se* §1 conspiracy case may be dispensed with in a conspiracy case under §2. As one commentator notes:

> [I]n those instances where power [in a defined market] is a prerequisite to holding an agreement to be an unreasonable restraint of trade . . . it would make no sense to hold the same agreement to be offensive to §2 without power. To require power under §1 before condemning a particular agreement is necessarily to say that the arrangement is . . . not harmful in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize.

3 Areeda & Turner, *Antitrust Law*, ¶839 at 359.

The Eighth Circuit's decision reflects a conflict among the circuits between the "classic" requirement of power in a defined market to support a §2 attempt or conspiracy claim and the "expansionist" role of §2 as a tool to control undesirable business conduct. 3 Areeda & Turner *Antitrust Law*, ¶821,

831-833; Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer To The Riddle Of Section Two*, 72 Mich. L. Rev. 375, 418-430 (1974); Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305-07 (1956). With respect to the "attempt to monopolize" offense, The National Commission for the Review of Antitrust Laws and Procedures[32] noted that "particularly in certain areas of Sherman Act Section 2 enforcement, unclear and somewhat confused legal standards are an important contributing factor to unnecessary delay and ineffective remedies in antitrust litigation." [33]

The Commission's comments with respect to "attempt to monopolize" apply with equal force to "conspiracy to monopolize" as the conflict among the circuits with respect to the requirement of relevant market proof demonstrates. This case should be reviewed to decide the question whether "conspiracy" under §2 may be used, as suggested by the court below, following *Lessig v. Tidewater Oil Co.*, *supra*, and its progeny, to "transform[] the character of section 2 from an antitrust law to a general statutory prohibition of unfair competition" [34] to reach business conduct aimed at a single competitor rather than competition in a defined market.

To hold, as the Eighth Circuit does here that a §2 conspiracy claim may be supported by a "minimal showing . . . as to

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[32] The Commission was convened by Executive Order in June 1978 to study methods of expediting complex antitrust litigation and improving the effectiveness of antitrust remedies. Exec. Order No. 12,022, 3 C.F.R. §155 (1977) as amended by Exec. Order No. 12052, 43 Fed. Reg. 15,133 (1978).

[33] National Commission For The Review of Antitrust Laws and Procedures, *Report To The President and the Attorney General*, at 143-44 (1979).

[34] P. Levine, *Attempt To Monopolize Under the Sherman Act: Defendant's Market Power As A Requisite To A Prima Facie Case*, 73 Colum. L. Rev. 1451, 1457 (1973).

the product and geographic context of the alleged conspiracy", 687 F.2d at 1193, App. at 30a, is to ignore this Court's early teaching that §2 is concerned with economic markets definable in terms that have "both a geographic and distributive significance." *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911). The Eighth Circuit's "product and geographic context" standard is an amorphous concept devoid of definable economic content. The petition should be granted to instruct the lower courts faced with antitrust complaints that judicial resources should be reserved for cases dealing with competitive restraints affecting identifiable *markets* which constitute "any part" of commerce.

III. The Eighth Circuit's Failure To Apportion Its Award Of Attorney's Fees And Costs On Appeal To Reflect The Extent To Which NFO Failed To Prevail Ignores The Statutory Language And Is In Conflict With The Holding Of Other Circuits.

Section 4 of the Clayton Act, 15 U.S.C. § 15 provides for an allowance of "cost of suit including reasonable attorney's fees" to a plaintiff who has established injury and damages "by reason of" a violation of the antitrust laws. The Eighth Circuit's December 13, 1982 Order, 696 F.2d 1210 (8th Cir. 1983); P. App. at 2a, awarded NFO $151,000 in attorney's fees for work done on appeal. The court refused to apportion the award of attorney's fees to reflect the extent to which NFO failed to prevail on the merits. 696 F.2d at 1211-12; P. App. at 3a-4a.

NFO failed in its claim against ARSPC and the Eighth Circuit affirmed the district's judgment of dismissal. 687 F.2d at 1179; App. at 3a. NFO also failed to prevail in four of its claims against the remaining defendants: claims numbered III (Attempt to Monopolize), IV (Monopolizations), V (Mergers and Monopoly-AMPI) and VI (Merger and Acquisitions

Tending to Lessen Competition and to Create a Monopoly-Mid-Am). NFO pressed all of these unsuccessful claims, which constituted a substantial and disproportionate aspect of its case, at trial and on appeal. 687 F.2d at 1191-92, 1206; App. at 27a-29a, 57a-59a. Yet the court herein refused to apportion the award of attorney's fees accordingly.

The Eighth Circuit's approach encourages antitrust plaintiffs to assert and pursue every possible antitrust claim, knowing that they will be compensated for time spent on all claims, if successful on any. Such a result overtaxes the entire judicial system by encouraging complex litigation and expensive discovery on claims unworthy of the cost. While the Ninth Circuit has reached a conclusion similar to that of the Eighth Circuit in this case, the Second and Fourth Circuits have held that an award of attorney's fees must be apportioned to reflect the degree to which an antitrust plaintiff prevailed.[35]

The Eighth Circuit's Order also awarded NFO certain "expenses" [36] which have previously been held by other circuits

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[35] *Compare Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 411 F.Supp. 627 (S.D.N.Y. 1976), *modified on other grds.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) *with Twin City Sportservice, Inc. v. Finley*, 676 F.2d 1291, 1312-1313 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982). *See also Henley v. Eckerhart*, No. 81-1227 (8th Cir. Sept. 28, 1981) (unpublished), *cert. granted*, 102 S.Ct. 1610 (1983).

[36] The Eighth Circuit awarded $8,363.95 for the following items of "recoverable expenses above the attorneys' fees and court costs previously awarded": air fares, meals and lodging, telephone, express mail and Federal Express/Emery Air Freight. 696 F.2d at 1212; P. App. at 4a.

to be non-taxable costs of litigation.[37] Under §4, a successful antitrust plaintiff has the right to recover the "cost of suit." Properly interpreted, the phrase "cost of suit" means only those statutory costs specifically identified in 28 U.S.C. §1920 and Federal Rule of Civil Procedure 54(d). If Congress had intended the "cost of suit" under §4 to mean expenses of litigation, there would have been no reason for adding the words "including a reasonable attorney's fee," since an attorney's fee would necessarily be a part of the expenses incurred in conducting the lawsuit.[38]

Moreover, the same words or phrases used in two statutes pertaining to the same subject matter should be construed in the same sense. Sands, *Sutherland Statutory Construction*, §51.02 at 290 (1973). There being no significant difference between "cost of suit" in the Clayton Act and "cost of suit" in Rule 54(d) and 28 U.S.C. §1920, there is simply no reasoned basis for departing from the accepted interpretation under Rule 54(d) for what are recoverable expenses. *See, e.g., State of Illinois v. Sangamo Construction Co., supra,* at 866.

Virtually all courts have rejected the interpretation of §4 by the Eighth Circuit and have limited prevailing plaintiffs

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[37] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n. 75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Straus v. Victor Talking Machine Co.*, 297 F. 791, 806-807 (2d Cir. 1924); *State of Illinois v. Sangamo Construction*, 657 F.2d 855, 866 (7th Cir. 1981); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 223-224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

[38] This interpretation of §4 of the Clayton Act was espoused in the leading decision of *Straus v. Victor Talking Machine Co., supra.* The *Straus* interpretation of §4 was, until recently, uniformly followed. The exception is *Copper Liquor v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir.), *reh. gr.*, 1982-83 CCH Trade Cas. ¶65,079 (1982), the only authority relied upon by the court below to support its position.

to recovery of costs specifically identified in 28 U.S.C. §1920. Such a ruling would integrate the rules regarding costs of suit.

CONCLUSION

The decision of the court below raises questions of importance relating to the remedial purposes of the antitrust laws that require answer for the instruction of the Federal judiciary and the antitrust bar. Accordingly, the petition for writ of certiorari should be granted.

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PETITIONER'S APPENDIX A

STATUTES INVOLVED, PARTIAL TEXT

1. Section 1 of the Sherman Act, 15 U.S.C. §1, as amended, which provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

2. Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with another person . . . to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . . .

3. Section 1 of the Capper-Volstead Act, 7 U.S.C. §291 which provides, in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of person so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

4. Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

5. Section 6 of the Clayton Antitrust Act, 15 U.S.C. §17, provides in pertinent part:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

PETITIONER'S APPENDIX B

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellant,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Mid-America Dairymen, Associated Reserve Standby Pool Cooperative, Appellees.
Wesley Johnson, Gary Hanman, Harold S. Nelson and David Parr, Central Milk Producers Cooperative, Appellee.

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Appellant.
Mid-America Dairymen; Associated Reserve Standby Pool Cooperative; Wesley Johnson; Gary Hanman; Harold S. Nelson; David Parr; Central Milk Producers Cooperative.

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Mid-America Dairymen, Inc., Appellant.
Associated Reserve Standby Pool Cooperative; Wesley Johnson; Gary Hanman; Harold S. Nelson;

David Parr; Central Milk Producers Cooperative.
Nos. 81-1235 to 81-1237.
United States Court of Appeals,
Eighth Circuit.
Dec. 13, 1982.

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON,* Chief Judge.

ORDER

Following our decision in *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), the National Farmers Organization (NFO) moved this Court for an award of expenses on appeal, including attorneys' fees, court costs, and other miscellaneous costs.[1] We have reviewed NFO's motions, memoranda, and affidavits; the various defendants' memoranda in opposition to NFO's requests; and NFO's response to the defendants' objections. We make awards based on the reasoning below.

[1] On the issue of attorneys' fees expended on appeal, NFO requests the following amounts to pay for services provided by the firm directing its appeal and other attorneys involved:

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* The Honorable PAUL BENSON, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

[1] We note that NFO only requests fees and costs connected to the appeal of its antitrust counterclaim, styled "Phase II" of the appeal in its schedule of fees and costs. We also treat NFO's request as seeking expenses from defendants found liable under its antitrust counterclaim, thereby excluding any expense claims against Associated Reserve Standby Pool Cooperative (ARSPC).

Firm/ Attorney	Total Phase II Hours	Total Phase II Hours X Proposed Billing Rates
Akin, Gump, Strauss, Hauer & Feld	2,348.70	$230,010.00
Marvin Beshore	333.30	19,998.00
Richard A. Green	42.45	6,367.50
TOTALS	2,724.45	$256,375.50

NFO considers this total to be the basic, or "lodestar," fee to which it is entitled, representing a reasonable number of hours expended on appeal multiplied by a reasonable legal rate per hour. NFO further requests that we enhance this award by fifty percent (applying a multiplier of 1.5 to the lodestar figure) in consideration of the difficulty of this appeal and the quality of NFO's representation on appeal. Thus, NFO's total request for attorneys' fees expended on appeal is $384,562.

We have considered the nature of legal services provided to NFO on this appeal, the quality of those services, the myriad of legal and factual questions raised, and the outcome of the case. We reduce the number of hours reasonably expended on NFO's behalf to those necessary to pursue this type of appeal without duplication of time and expertise. We also find that $125 per hour is the maximum reasonable legal rate applicable to any services provided, based on billing rates in this Circuit over the time period taken to prepare this appeal. We adjust the rates applied to the various services provided in that preparation accordingly. Under this ap-

proach, we find that the lodestar figures applicable to NFO's representatives on appeal are:

Firm/ Attorney	Reasonable Phase II Hours X Reasonable Billing Rates
Akin, Gump, Strauss, Hauer & Feld	$130,000
Marvin Beshore	16,000
Richard A. Green	5,000
TOTAL	$151,000

We refuse to enhance this total lodestar figure, as requested by NFO, since we do not see this as an extraordinary case meriting such enhancement. We do not detract from the importance of the case, but NFO's success here can be attributed to long hours and meticulous preparation, which we feel have been reasonably considered in our calculation of the lodestar figure. We also decline to apportion the award of attorneys' fees to NFO based on the defendants' conceptions of the scope of NFO's victory, as suggested in opposing memoranda filed by Associated Milk Producers, Inc. (AMPI) and Central Milk Producers Cooperative (CMPC). The question of apportioning attorneys' fees based on the number of issues on which a party prevails is pending before the Supreme Court in its grant of certiorari in *Hensley v. Eckerhart*, —— U.S. ——, 102 S.Ct. 1610, 71 L.Ed.2d 847 (U.S.1982). We do not reach that apportionment question here, because the issues raised on this appeal are so interrelated that we cannot say that any of the services compensated out of this award were not part of NFO's success on appeal. Also, we have considered the ultimate outcome of the appeal in our calculation of the lodestar figure and our refusal to enhance that figure by the

suggested 1.5 multiplier. Therefore, we order attorneys' fees in favor of NFO in the amount of $151,000.

[2] NFO further requests its costs on appeal pursuant to Fed.R.App.P. 39, in essence the costs of copying briefs and the appendix in this case, in the amount of $11,510.50. *See Alexander v. National Farmers Organization, supra,* 687 F.2d at 1210. NFO bases this request on a copying cost of fifty cents per page. We find this per page charge unreasonable in this case, and order these court costs be paid by the defendants only to the extent of twenty cents per page, for a total of $4,604.20.

[3] Finally, NFO seeks an award of expenses on appeal totaling $17,195.05, covering disbursements allegedly attributable to pursuing this appeal. NFO asserts these expenses are recoverable under language in the Clayton Act, as amended, authorizing awards of "the cost of suit, including a reasonable attorney's fee" in antitrust damages actions, 15 U.S.C. § 15 (Supp. V 1981), and in antitrust suits seeking injunctive relief, 15 U.S.C. §26 (1976). NFO recognizes a split in the circuits on whether this language authorizes an award of expenses beyond those normally considered as court costs. *Compare State of Illinois v. Sangamo Construction Co.,* 657 F.2d 855, 866 (7th Cir. 1981) ("cost of suit" in Clayton Act same as "costs of suit" in Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920 (1976 & Supp. II 1978)) *with Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1100-1101 (5th Cir. 1982) (expenditures not listed in 28 U.S.C. § 1920 (1976 & Supp. II 1978) recoverable under 15 U.S.C. § 15 (Supp. V. 1981)). We are inclined to agree with a liberal interpretation of the Clayton Act which allows an award of actual expenses incurred on appeal, whether considered part of the "cost of suit" or part of a "reasonable attorney's fee." *See Copper Liquor, Inc. v. Adolph Coors Co., supra,* 684 F.2d at 1101.

We do not agree, however, that all items listed in Schedule C of the affidavit supporting NFO's motion for a disbursements award can be attributed solely to this appeal, as opposed to being general overhead normally paid by law firms and lawyers as a cost of doing business. We also reduce NFO's claims on some items which are attributable to this appeal to reflect a reasonable amount of expenses necessary for an appeal of this magnitude. We decide that only the following items are recoverable expenses above the attorneys' fees and court costs previously awarded:

Item	Firm/Attorney	Amount
Air Fares, Meals & Lodging	Akin, Gump, Strauss, Hauer, & Feld (Akin Firm)	$3,953.00
	Marvin Beshore	968.35
Telephone	Akin Firm	1,529.00
	Marvin Beshore	698.96
Express Mail	Akin Firm	1,192.14
Federal Express/ Emory Air Freight	Akin Firm	32.50
	TOTAL	$8,363.95

This award of expenses is consistent with our allowing only reasonable attorneys' fees and court costs, and with the goal of encouraging private enforcement of the antitrust statutes.

We therefore order awards in favor of NFO of $151,000 for reasonable attorneys' fees, $4,604.20 for court costs, and $8,363.95 for reasonable excess expenses incurred in pursuing this appeal, to be paid in equal shares by defendants AMPI, CMPC, and Mid-America Dairymen, Inc. (Mid-Am).

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CLERK

Nos. 82-1585, 82-1586 and 82-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

MID-AMERICA DAIRYMEN, INC.,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,
v.
THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-1585, 82-1586 and 82-1582

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

MID-AMERICA DAIRYMEN, INC.,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent The National Farmers' Organization, Inc. (NFO)[1] respectfully submits this brief in opposition to the Petitions for Writ of Certiorari filed by Associated Milk Producers, Inc. (AMPI), Mid-America Dairymen, Inc. (Mid-Am), and Central Milk Producers Cooperative (CMPC), to review the decision of the United

[1] NFO has no parent or subsidiaries and its affiliates were identified in its Petition for a Writ of Certiorari in Docket No. 82-1324.

States Circuit Court of Appeals for the Eighth Circuit finding that Petitioners illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk in violation of Sections 1 and 2 of the Sherman Act.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 687 F.2d 1173, appears in the Appendix of the Petition for Writ of Certiorari filed by The National Farmers' Organization, Inc., in Docket No. 82-1324, Appendix ("App.") at 1a. The opinion of the United States District Court for the Western District of Missouri, reported at 510 F. Supp. 381, appears at App. 67a. The Order of the Court of Appeals awarding costs and attorneys' fees on appeal is reported at 696 F.2d 1210 and appears in the Appendix to the Petition for Writ of Certiorari filed by the Central Milk Producers Cooperative in Docket No. 82-1582, Petitioner's Appendix ("P. App.") at 3a.

STATEMENT OF THE CASE

NFO seeks in this case nothing more than the freedom to sell milk unhindered by Petitioners' monopolistic harassment, and redress for the devastation Petitioners have inflicted and continue to inflict on NFO's marketing activities. After ten years of bitter litigation in the lower courts, and tens of millions of dollars in expenses, the Eighth Circuit Court of Appeals laid bare the ugly record of Petitioners' unrestrained predation and held NFO entitled to damages and injunctive relief.

While the details fill many file drawers in the record, the essential fact pattern in this case is not complex. Petitioners are the organizational products of a massive dairy merger wave in the late 1960's and 1970's. Independent milk sellers like NFO were viewed by Petitioners as a threat because they sold raw milk at lower prices, but paid their dairy farmer members competitive returns. (687 F.2d at 1194; App. 33a) Fearing com-

petition for members and customers, Petitioners coordinated a broad predatory campaign to destroy the ability of NFO and other independents to compete.

Initially, NFO's dairy program grew exponentially, but NFO quickly faced a mushrooming customer boycott all across the Midwest by dairies who had been harassed by Petitioners. Their tactics are classics in the history of antitrust litigation: supply cutoffs, short-shipping, discriminatory pricing, litigation, threats of litigation and below-cost predatory retail competition, among others. Petitioners succeeded. As a direct intended result, NFO lost substantial numbers of customers, potential customers and dairy farmer members. The Eighth Circuit held that Petitioners had engaged in a clearly unlawful predatory conspiracy in violation of §§ 1 and 2 of the Sherman Act, held that NFO had been injured in fact in a number of ways, and remanded for further proceedings as to the amount of NFO's damages and the scope of injunctive relief.

Petitioners now come to this Court seeking immunity based on at least seven different and often patently frivolous claims. Their arguments share two fatal flaws. First, Petitioners fail to cite a single decision, and there are none, exonerating the sort of predatory conduct they engaged in. Second, they studiously ignore or "revise" the facts of the case. This is not new. As the Court of Appeals commented, after detailing Petitioners' harassment of NFO customers from Minnesota to Texas: "Mid-Am and AMPI ignore most of the foregoing incidents in their argument on appeal." (687 F.2d at 1202; App. 49a) Nor is it surprising, since the facts unmistakably reveal a classic combination and conspiracy to eliminate competition, planned and executed at the highest levels of Petitioners' organizations.

The Eighth Circuit found that "the record reveals straightforward admissions of predatory motive by various AMPI officials and former officials." (687 F.2d at

1207; App. 60a) "Senior AMPI officials," found the Court, discussed sponsoring third-party suits against NFO in order to "break NFO's back" with litigation expenses. (687 F.2d at 1200; App. 45a).[2] One of these "senior" officials was AMPI's chief executive officer; another was AMPI's immediate past chief executive officer. AMPI's attempt to escape the facts, moreover, did not begin in the Court of Appeals. The Eighth Circuit found AMPI had intentionally suppressed and destroyed evidence during discovery:

> AMPI engaged in a deliberate pattern of shuffling and hiding documents—to warehouses, homes or other locations—specifically to avoid discovery.
>
> More serious is the stipulated fact that AMPI ordered the destruction of documents and that some were in fact destroyed. The district court characterized this conduct as involving "admitted bonfires." (687 F.2d at 1205; App. 55a-56a)

The Eighth Circuit found that Mid-Am's predation also originated at the top: "Mid-Am's practice of threatening or harassing buyers of NFO milk was planned as a strategy at Mid-Am board meetings." (687 F.2d at 1202; App. 49a) Similarly, CMPC, which also threatened litigation against NFO customers (687 F.2d at 1200; App. 46a), implemented with AMPI a scheme of anti-NFO predation in Chicago that was discussed at CMPC Board of Director meetings. (687 F.2d at 1197; App. 40a) The Court dismissed CMPC's convoluted defense of this conduct as "simply untenable" (687 F.2d at 1199; App. 43a), and concluded:

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[2] It is undisputed that such litigation was, in fact, filed less than six weeks after the "break NFO's back" meeting, and that plaintiffs were represented by AMPI's attorneys. The litigation was eventually voluntarily dismissed just prior to trial after eight years of burdensome motion and discovery practice. Since AMPI's attorneys were working on a contingent fee basis and there was no recovery, Plaintiffs in the sponsored litigation essentially were provided with AMPI's legal services for free. Petitioners' sham litigation against NFO is the subject of NFO's Certiorari Petition in No. 82-1324.

"CMPC's conduct itself . . . is the strongest evidence of an unlawful purpose . . . the conduct so established is predatory on its face." *Id.*

Petitioners' briefs to this Court gloss over the destruction of evidence and the raw predation and its planning and implementation by Petitioners' boards of directors and other high executives and attorneys. Instead, this Court has been presented with a sterilized, whitewashed version of the facts that ignores what this case was really about. NFO submits, however, that the crystal clear record of Petitioners' predation defeats their consistent efforts to wish it away.

REASONS THE WRITS SHOULD BE DENIED

I. The Eighth Circuit's Relevant Market Analysis Is In Harmony With Decisions Of Other Circuits And This Court And Raises No Important Issues For Review

CMPC, AMPI and Mid-Am press two grounds for review based on the Eighth Circuit's alleged failure to adequately define a relevant market: (1) they contend that without a relevant market, the § 1 Sherman Act judgment is faulty because their activities were subject to rule of reason analysis which always requires proof of relevant market; and, (2) by not requiring full-blown relevant market proof in a Sherman Act § 2 conspiracy case, the Eighth Circuit created a "dramatic conflict" (Mid-Am at 10) among the circuits. No review should be granted because: (1) defendants clearly engaged in *per se* illegal concerted predatory practices, eliminating any relevant market requirement under Sherman Act § 1; (2) no conflict among the circuits exists, since no court has ever required relevant market proof in a § 2 conspiracy case involving concerted predatory practices; and (3) no important antitrust questions are presented by § 2 conspiracy relevant market issues, since concerted predatory practices, like Petitioners', always, in any event, fully violate § 1.

A. Defendants Engaged In *Per Se* Illegal Concerted Predatory Practices

Defendants' activities were clearly *per se* illegal. The Eighth Circuit found that defendants engaged in a horizontal conspiracy using raw predation to eliminate NFO and other independent milk sellers in order to raise prices. No court has ever held such inherently anticompetitive practices subject to the rule of reason.

A few references to the Court of Appeals opinion place defendants' conduct, virtually ignored by defendants' briefs, into proper perspective:

> NFO was a specific target of the conspiracy. This conspiracy violates Sections 1 and 2 of the Sherman Act, notwithstanding the Capper-Volstead exemption, because it involved the concerted use of predatory and other unlawful anticompetitive means to eliminate competition and pursue monopoly power. (687 F.2d at 1191; App. 26a-27a.)
>
> [O]nly one conclusion . . . can be drawn. AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk. (*Id.* at 1193; 31a-32a.)
>
> [This] conduct [in Chicago] . . . is plainly predatory. Simply put, CMPC and its agent AMPI sought to establish a premium for their milk . . . . Facing continuing rejection of a premium under these conditions [NFO competitive sales to Wanzer Dairy], AMPI and CMPC employed discriminatory pricing and coercive threats of supply cutoffs against Wanzer . . . . (*Id.* at 1198; 41a.)
>
> . . . In our view the conduct so established [in Chicago] is predatory on its face. (*Id.* at 1199; 43a.)

> [S]enior AMPI officials considered sponsorship of additional third-party litigation against NFO in the hope that the added cost of such litigation would "break NFO's back." (*Id.* at 1200; 45a.)
>
> Mid-Am, AMPI and CMPC . . . used the membership disputes with NFO as a pretext for threatening litigation against and otherwise harassing proprietary dairies which bought or considered buying NFO milk . . . . The findings and record evidence reveal . . . a broad pattern of litigation threats and harassment against buyers of NFO milk. (*Id.* at 1200; 46a.)
>
> Mid-Am's practice of threatening or harassing buyers of NFO milk was planned as a strategy at Mid-Am board meetings . . . . Mid-Am's subsequent conduct shows that the boardroom discussion was not merely idle talk. (*Id.* at 1202; 49a.)
>
> [T]he Foremost incident gives rise to only one conclusion: NFO was caught in a whipsaw created by the coercive conduct of AMPI and Mid-Am toward buyers of independent milk in general and NFO milk in particular. (*Id.* at 1204; 53a.)
>
> [T]he record reveals straightforward admissions of predatory motive by various AMPI officials and former officials. (*Id.* at 1207; 60a.)
>
> Here, the totality of the record leaves no doubt that Mid-Am, CMPC and AMPI conspired to gain control over and eliminate competition in the marketing of Grade A milk through the unlawful tactics noted above. (*Id.* at 1208; 61a.)

These concerted predatory practices, aimed at eliminating all competition, not just NFO, are classic *per se* Sherman Act violations straight from the pages of the unanimous Supreme Court decisions in *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *United States v. Borden Co.*, 308 U.S. 188 (1939).[3]

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[3] Defendants apparently try to take comfort from the fact that the Court of Appeals refers repeatedly to defendants' activities as

The defendants' conduct, "predatory on its face," required no rigorous relevant market analysis to assess its competitive significance. It was inherently and intentionally destructive of competition.

B. No Appellate Court Has Ever Required The Rigorous Relevant Market Proof Petitioners Urge In A § 2 Conspiracy Case Involving Concerted Predatory Practices Intended To Destroy All Competitors

Trying to create a circuit conflict over § 2 conspiracy relevant market requirements, defendants ignore the facts in the cases. Every appellate decision cited by defendants as requiring rigorous relevant market proof involved ordinary rule of reason-type offenses that had ambiguous competitive significance unless analyzed in a structural setting.[4] On the other hand, rigorous relevant market

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"concerted predatory conduct" without affixing the Latin label *"per se."* However, as the court noted (687 F.2d at 1193 n.16; App. 30a n.16), "concerted predatory conduct . . . is 'unreasonable' under Section 1 regardless of whether the *per se* label is attached." It must be noted that in *Klor's, supra*, the classic group boycott case, this Court *treated* the boycott as *per se* illegal without ever actually using the talismanic phrase, *per se*.

[4] Defendants claim that § 2 conspiracy cases in the Third, Fourth, Fifth, Eleventh and D.C. Circuits require relevant market proof. The holdings in a number of these cases are ambiguous at best, reflecting a commentator's observation that "often . . . the [§ 2] conspiracy allegation appears to be no more than an afterthought . . . and it seldom gets the court's attention." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358 (1978). Nevertheless, each of these cases involved rule of reason-type offenses that would require relevant market proof even under § 1. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (challenged exclusive dealing contracts were "examined under the rule of reason"); American Football League v. National Football League, 323 F.2d 124, 132 (4th Cir. 1963) (joint venture rule of reason analysis focusing extensively upon defendant's business justifications); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (business tort-type conduct explictly held subject to rule of reason); Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983) (vertical distribution rule of

proof has not been required in any case involving, as here, concerted predatory practices revealing on their face a specific intent to eliminate competition and control prices.

This consistent distinction between the cases is best expressed in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981):

> [N]o particular level of market power or 'dangerous probability of success' has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. [Citations omitted.] But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. [Citations omitted.]

See L. Sullivan, *Handbook of the Law of Antitrust* at 139-40 (1977); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358-59 (1978) ("where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for the § 2 conspiracy offense is understandable").

In *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961), as in other cases involving concerted predation,[5] relevant market was considered unnecessary because of the nature of defendants' practices:

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reason analysis); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (vertical distribution rule of reason analysis).

[5] *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 226 (1946) (use of competition-stifling practices that "have been condemned time and again as violations of the [Sherman] Act"; held: no relevant market required); United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) (criminal conviction). *Accord*: United States v. du Pont & Co., 351 U.S. 377, 395 n.23 (1956). Defendants suggest that a later Second Circuit case conflicts with *Consolidated Laundries*, but this case simply illustrates the consistency in the case law, since it did not, like *Consolidated*, involve concerted predatory practices. *See* Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing, Inc., 510

> [T]he defendants took concerted action to drive independent non-cooperative linen suppliers out of business. In our opinion this was sufficient to support the conclusion that defendants had the specific intent to monopolize.

Here too, as in *Consolidated Laundries*, defendants' practices virtually on their face conclusively establish specific intent to monopolize. The Eighth Circuit repeatedly emphasized that defendants' predation was intended to eliminate not just NFO but, instead, *all* competing milk sellers, for the explicit purpose of raising prices. No appellate decision involving such clear malevolent intent, and concerted predation, has ever required formal relevant market proof in a § 2 conspiracy case. The Eighth Circuit's opinion creates no conflicts.[6]

F.2d 1140 (2d Cir. 1975). In *Hudson Valley*, the court found no *per se* offenses, and because of the ambiguous nature of defendants' practices, simply commented that structural evidence would have been helpful on "the question of whether . . . specific intent existed." *See also* Karlinsky v. New York Racing Assn., 517 F.2d 1010, 1011 (2d Cir. 1975), relied upon by defendants, which similarly does not conflict with *Consolidated*. *Karlinsky* involved no concerted predatory practices, but instead only vague allegations of ambiguous violations, which the Court dismissed as "frivolous."

[6] We would note, moreover, that in any event, the evidence of relevant market and defendants' power in this case more than satisfies any requirements for such evidence even in § 2 rule of reason cases. The Eighth Circuit clearly found raw Grade A milk to be the relevant product market and found the geographic aim of the conspiracy to be a "ten-state region" of the Midwest (687 F.2d at 1191, 1193; App. 27a, 30a). The ten states as revealed in the pleadings are: Wisconsin, Minnesota, Nebraska, Iowa, Illinois, Missouri, Kansas, Oklahoma, Arkansas, and Texas. This is the *same* relevant market alleged by *Mid-Am* in its original and five amended complaints against *NFO* (Ct. App. Record 2111-78, 2198-2360), thus constituting a conclusive judicial admission. McCormick, *Handbook of the Law of Evidence* § 265 (2d ed. 1972); 9 Wigmore, *Evidence* § 2589 (Chadbourn rev. 1981). Further, the Eighth Circuit said that defendants "do not deny having . . . significant market power" and that "we . . . are presented with the certainty, on this record, that AMPI, CMPC, and Mid-Am are the major marketers of raw milk produced in the Midwest . . . ." (687 F.2d

C. The § 2 Relevant Market Requirement Does Not Present An Important Antitrust Issue

As a further reason to deny review, a ruling upon the relevant market question raised by defendants would be largely unimportant both in this case and in antitrust law generally. As the Eighth Circuit noted, citing *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 463 (1960), the same predatory conspiracies may violate *both* § 1 and § 2 of the Sherman Act, and here, the Eighth Circuit in fact held defendants liable to NFO for violating both, through the same predatory conduct. The law has been absolutely clear for more than fifty years that concerted predatory practices, like those of defendants in this case, violate § 1 without necessity to prove relevant market. Thus, even if this Court were to reverse *Yellow Cab* and hold rigorous relevant market proof necessary for § 2 predatory conspiracies, defendants would *still* be fully liable to NFO under §1.

Areeda and Turner, who devote less than two pages of their five volume antitrust treatise to § 2 conspiracies, make the same point:

> Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint of trade, without the need for considering the additional complexities that flow from using the § 2 monopoly concept. *There is therefore no need whatever to try to define the content of the § 2 conspiracy.* [Emphasis added.]

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at 1192; App. 28a-29a.) The only unresolved question found by the Court was the precise level of defendants' market shares—a significant issue in § 2 actual and, perhaps, attempted monopolization cases, but irrelevant in § 2 conspiracy cases. In light of the defendants' own admissions as to market and market power, the vehemence of defendants' objections to the Eighth Circuit's opinion is ironic indeed.

3 P. Areeda & D. Turner, *Antitrust Law* ¶ 839 at 358 (1978). Thus, NFO submits that the § 2 conspiracy issue raised by defendants simply does not present a significant antitrust issue worthy of this Court's plenary consideration.

II. NFO, Injured As A Result of Being The Direct Target of An Unlawful Conspiracy Among Its Competitors, Properly Has Standing Under The Prior Decisions of This Court

The Petitioners' standing argument[7] is that they may lawfully drive a competitor—NFO—out of business by depriving NFO of customers and members. Two months ago this Court decided *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. —— 51 U.S.L.W. 4139 (February 22, 1983). That decision explicitly confirmed the standing of a competitor—such as NFO—to sue when its business is restrained by its competitors. Petitioners seek to avoid the impact of that decision by selectively lifting language from it, and asking this Court to speak again on the subject, only this time in a way more to Petitioners' liking. In fact, an analysis of Petitioners' arguments demonstrates that what they really seek is to have ninety-three years of antitrust precedents thrown into the refuse pile and to replace them with an "open season" doctrine which permits conspirators to prey on their competitors. The basic rationale of Petitioners' argument is that any harm NFO suffered as a result of their predation was "indirect and hence non-compensable." Petitioners also argue that they may lawfully eliminate NFO as a marketing organization competing for dairy farmer patronage since restraint of competition for such patronage does not involve a "product" and therefore cannot violate the antitrust laws. Finally, they argue that when they succeed in depriving NFO of revenue from members, these losses must all go uncompensated because they have done the

[7] CMPC Petition at 8-18.

public a favor by eliminating a group that intended to increase dairy farmers' income.

There has never been any question in this case that NFO competes with Petitioners for members and customers. NFO markets the milk of dairy farmers, and dairy farmers choose between NFO and Petitioners in deciding what organization they will join and market through. Milk handlers and processors, in turn, choose between NFO and Petitioners in deciding from whom they will purchase milk. Indeed this litigation originated from this very competition: Mid-America charged NFO with monopolizing the same business that Mid-America was in, by making Mid-America "lose customers to NFO" and by inducing farmers "to market milk through NFO."

The Eighth Circuit thus specifically found that NFO's and Petitioners' Milk marketing programs were in "*direct competition*" and that NFO, as a competitor, was a "*direct target of the unlawful conspiracy*" (687 F.2d at 1209; App. 63a) (emphasis added). These findings alone are sufficient to establish NFO's standing under the antitrust laws. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 340a (1978) ("Such standing is so clear that it is seldom challenged . . ."); *TV Signal Company of Aberdeen v. American Telephone & Telegraph*, 617 F.2d 1302, 1309 (8th Cir. 1980) ("Plaintiff has amply demonstrated standing since it was both a competitor and a potential competitor"). A holding that NFO does not have standing to complain when its competitors use unlawful means to drive off its customers and prevent it from attracting and retaining membes, would indeed make this case worthy of certiorari because this would be the most remarkable and radical change in antitrust doctrine since 1890.

Petitioners ignore this direct competition and boldly "invoke" *Associated General Contractors of California.* Although *Associated General Contractors* did not involve a complaint by an injured competitor, it does confirm NFO's standing. There, the plaintiff union complained

that the defendant contractors association had coerced landowners into boycotting union contractors and had coerced contractors into refusing to sign collective bargaining agreements with unions. This Court held that the union was not injured in its business or property within the meaning of the antitrust laws, but this Court's resolution of the injury and standing issues in *Associated General Contractors* confirms the correctness of the Eighth Circuit's decision—that NFO has standing here.

Most importantly, this Court stressed that "the Union was neither a consumer nor a *competitor*." 51 U.S.L.W. at 4145 (emphasis added). NFO is a competitor of the defendants. Because plaintiff in *Associated General* was neither a competitor nor a consumer the decision observed that it was not even clear whether the union's interests would be served or disserved by enhanced competition between contractors.[8] *Ibid.* A fortiori, there cannot be any question that NFO's interests were disserved—legally injured—by a reduction in competition when it was *NFO's* competition that was reduced.

This Court also stated that the union's injuries were only an indirect result of harm to competition in the contracting market. *Ibid.* The opinion goes on to point out that those contractors from whom business had been diverted—those whose position is identical to NFO's—*would* have been directly injured and would have had a right to maintain treble damage actions. A footnote to the Court's discussion reinforces this critical distinction:

> In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices.

Id. at n.44. NFO is a participant in the market Petitioners are in. NFO competes with them for milk sales

[8] Customers and competitors, as a matter of inexorable logic and by the clear implication of this opinion, are injured by a reduction of competition in the market they purchase or compete in.

and for members. *Associated General Contractors* may hold that the telephone company and the electric company cannot sue for reduced revenues when NFO's operations are stunted, but it does not hold that NFO is a sitting duck that Petitioners may freely remove from the competitive scene. It holds, indeed, quite the opposite—when Petitioners sought to weaken or destroy their competitor by driving away customers and members, NFO had a right to sue.

Petitioners also try to make NFO a sitting duck with some subsidiary "injury" arguments, none of which can withstand scrutiny. The first is that only competition in "milk" is protected under the antitrust laws, and that competition for the membership and patronage of farmers is not. CMPC Petition at 11-12. No authority is cited. There is none.

The second is that NFO's damages are "speculative" because NFO might have lost membership dues and marketing income for reasons unrelated to the antitrust violations, even though the Eighth Circuit held the violations to be a material cause of NFO's injuries. CMPC Petition at 10-12. Mid-Am and AMPI, of course, seek recovery for the *same* damage items in their suits against NFO. Moreover, Petitioners' argument was squarely rejected in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 at 114, n.9 (1969) holding that once the unlawful conduct is shown to be a material cause of injury, the victim ". . . need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury."[9]

Fittingly, Petitioners' "injury" argument closes with a claim that because NFO's aim was to obtain higher prices

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[9] Petitioners attempt to escape the effect of *Zenith* by citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Reliance on Illinois Brick is totally misplaced because it involved an intervening cause—a middleman's decision whether to pass on an overcharge—and not the question of whether other concurrent causes also contributed to a particular clearly demonstrable injury.

for farmers, Petitioners were acting procompetitively when they tried to wipe out NFO. CMPC Petition at 12-14. The antitrust laws do not permit private vigilantes to take the law into their own hands and destroy competitors on the pretext of "protecting competition." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), on which Petitioners base this wild argument, simply holds that a plaintiff cannot complain that he lost profits because there was too much competition. Petitioners "extrapolate" from this a license to decide what is best for the economy and to annihilate any competitors they disapprove of. This is utter nonsense.

III. This Case Does Not Present The Issue Of Whether A Conspiracy Can Be Premised Solely Upon Joint Exempt Conduct Since The Evidence Of Nonexempt Conspiratorial Conduct Is Abundant

According to Mid-Am[10] and AMPI,[11] the Eighth Circuit based its finding of a conspiracy *solely* upon activities that were antitrust-exempt under the *Noerr-Pennington* doctrince and Capper-Volstead Act. Petitioners have simply mischaracterized the Court's opinion and the record. In fact, the evidence of nonexempt conspiratorial activity was pervasive. The Court found that CMPC, Mid-Am and AMPI simultaneously engaged in a coordinated series of nonexempt predatory practices to destroy competitors, including NFO. These activities included coercing proprietary dairies to boycott NFO milk through supply cutoffs, short shipping, discriminatory pricing, bad faith litigation, and threats of litigation.

Petitioners do not, and cannot, contend that *any* of these practices are antitrust-immune, and the record overflows with evidence that they were the product of conspiracy. It is sufficient here, however, to emphasize that key parts of this predation were actually imple-

[10] Mid-Am Petition at 18-21.

[11] AMPI Petition at 17-24.

mented *jointly*, thereby conclusively establishing nonexempt concerted action. One key example is the Wanzer Dairy incident in Chicago discussed at 687 F.2d at 1197-99; App. 38a-44a of the Court of Appeals opinion. Through discriminatory pricing and threatened supply cutoffs, defendants blatantly coerced Wanzer Dairy into boycotting NFO. The Court ruled that "the conduct so established is predatory on its face." (687 F.2d at 1199; App. 43a.) AMPI was CMPC's Chicago marketing agent, and the Court found that AMPI and CMPC actively worked together to implement the predation. Thus, held the court, "both must be viewed as responsible for their joint role." (687 F.2d at 1197; App. 38a) AMPI, moreover, kept Mid-Am informed of this campaign against NFO in Chicago (687 F.2d at 1199 n.28; App. 42a n.28), and Mid-Am and AMPI worked together in the Southwest. For example, both Mid-Am and AMPI threatened Beatrice Dairy, Ft. Worth, with predatory reprisals for buying independent milk, even though Beatrice was only an *AMPI* customer, never a Mid-Am customer. As the Court found, after consulting with AMPI, Mid-Am brought sham litigation against Beatrice for the express purpose—and with the effect—of inducing Beatrice to boycott NFO milk. (687 F.2d at 1201, 1207; App. 47a, 60a.)

While the record contains an abundance of evidence of nonexempt activities from which a conspiracy could be inferred, these and other *joint* nonexempt actions establish concerted predatory conduct beyond any dispute. As the Court summarized, defendants' predation took place in the same time frame, they often acted jointly or for each others' mutual benefit, and the defendants left a "substantial paper trail" revealing their joint predatory plans and actions:

> [I]n approximately the same time frame [defendants engaged in] a series of acts . . . aimed at eliminating independent sales of milk in general and NFO in particular, including discriminatory pricing

and actual or threatened supply cutoffs, litigation and similar harassment. Some of Mid-Am's litigation threats were directed against buyers of NFO milk that had been AMPI customers, not Mid-Am customers. Mid-Am, in fact, gave AMPI advance notice of the suit it filed against NFO and Beatrice. AMPI and CMPC, of course, are inextricably bound together in the predatory actions undertaken in the Chicago market. The record also reveals that the defendants jointly discussed what they viewed as common "problems" posed by NFO.

Apart from the actual conduct of the defendants, the record reveals straightforward admissions of predatory motive by various AMPI officials and former officials . . . . Much of the record . . . consists of deposition testimony and over 5,000 documentary exhibits. Included is a substantial paper trail of meeting minutes and contemporaneous memoranda, from Mid-Am and AMPI meetings and from independent dealers, which tend to confirm the conspiratorial and predatory character of the conduct described here as unlawful. In short, the defendants' conduct on its face demonstrates concerted, unlawful tactics and such a conclusion is confirmed, not contradicted, by examination of the underlying record.[12] (687 F.2d at 1207; App. 60a.)

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[12] As an example of the underlying undisputed evidence of conspiracy, the record shows that on October 19, 1970, representatives of AMPI, Mid-Am, and CMPC met at the Bloomington, Minnesota Sheraton Inn "to discuss [their] similar experiences" concerning "NFO's marketing milk in their markets at cutrate prices." (Dist. Ct. Opinion at App. 270a-271a) That very same day CMPC and AMPI implemented the scheme of predatory price discrimination in Chicago. (*See id.* at 270a, and Ct. App. Opinion at 38a-44a) The predatory purpose of this scheme was discussed at meetings of Mid-Am Division Managers ("CMPC to raise handling chg . . . to Wanzer and any other customer they do not have full supply contract with—*aimed at NFO and Southland*") (NFO Exh. 91, emphasis added), and Board of Directors ("38¢ handling chg Wanzer/Southland . . . part supply—*may mean NFO milk not have a home*") (NFO exh. 1525, emphasis added). In response to this clear evidence of conspiracy, defendants failed to call as a witness at trial

Because the record is replete with "nonexempt" evidence of conspiracy and actual joint predatory conduct, the issue of whether a conspiracy finding can be premised solely upon evidence of exempt concerted activity is simply not presented by this case.[13]

IV. The Eighth Circuit Acted Well Within The Scope of Its Appellate Function In Reversing The District Court's Judgment

Petitioners' claim that the Court of Appeals "usurped" the trial court's fact-finding function [14] is as undeserving of this Court's attention as it is devoid of merit. First, they do not even pretend to satisfy any of the standards justifying review by this Court, nor could they. Secondly, an examination of what the Court of Appeals did reveals scrupulous adherence to the Rule 52(a) "clearly erroneous" principle as enunciated by this Court.[15]

The Court of Appeals did not conduct *de novo* factual

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any participant in the October 19 meeting. If this Court were to re-examine the Eighth Circuit's conspiracy conclusion, it would be compelled to retrace the "substantial paper trail" in the "underlying record."

[13] Mid-Am and AMPI hinge their whole argument on the erroneous contention that the *sole* evidence of conspiracy was exempt joint conduct. They do not—indeed, cannot—otherwise contend that the Court of Appeals misapplied this Court's prior decisions in ruling (App. at 35a-36a) that defendants' allegedly exempt joint conduct may be considered to show the "purpose or character" of other nonexempt activity. United Mine Workers v. Pennington, 381 U.S. 657, 671 n.3 (1965). Further, it must be noted that any fair review of the Court of Appeals opinion reveals that the allegedly exempt joint conduct comprised only a tiny portion of the total conduct at issue.

[14] AMPI Petition at 24-29.

[15] In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) this court held that "a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

review in reversing the lower court's decision.[16] Indeed, as the Court of Appeals expressly stated:

> The district court's affirmative factual findings and record evidence in support thereof . . . unmistakably show that AMPI, CMPC and Mid-Am illegally conspired to monopolize Grade A milk marketing and to eliminate competition in the marketing of such milk, and that NFO was a specific target of the conspiracy. (687 F.2d at 1191; App. 26a-27a.)[17]

The Court of Appeals thus strictly adhered to the "clearly erroneous" rule, basing most of its determinations on the trial court's findings and rejecting them only in those instances in which examination of the evidence as a whole, rather than as dismembered components, showed that a finding was wrong. (687 F.2d at 1207-08; App. 60a-61a). *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690, 699 (1962). The degree of deference shown the trial court here is, in fact, remarkable, for the core of NFO's case consisted of documents, admissions and testimony from the participants in the conduct complained of, and none of these principals showed his face in court to have his demeanor and credibility evaluated.[18] *See United States v. General Motors*, 384 U.S. 127, 141-

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[16] The Eighth Circuit, clearly mindful of the proper role of a reviewing court, expressly stated that "In looking at the evidence underlying the findings, we do not contemplate a *de novo* review." (687 F.2d at 1199; App. 48a)

[17] The Eighth Circuit reiterated its reliance on the district court's affirmative findings of fact as it examined each element of NFO's conspiracy claim. *See, e.g.*, 687 F.2d at 1191; App. 27a (product market); 687 F.2d at 1193; App. 30a (relevant market); 687 F.2d at 1196; App. 38a-44a (predatory conduct); 687 F.2d at 1200; App. 46a (litigation threats and harassment).

[18] Petitioners' smokescreen, for example, about the trial judge's evaluation of the "conflicting testimony" on the Foremost incident, neglects to mention that not one whit of the story was disputed in open court. (Mr. Murphy never appeared at trial.)

146 n.16 (1966). Petitioners received the benefit of this deference when the Eighth Circuit refused to disturb the trial court's findings on market share (687 F.2d at 1191-92; App. 27a-29a), price-fixing with dealers (687 F.2d at 1199; App. 44a), mergers (687 F.2d at 1206; App. 58a-59a) and "pool-loading" (687 F.2d at 1206-1207; App. 59a) the latter in the face of a recognition of substantial evidence that it was unlawful. *Ibid.*

The short of it is that, if anything, the Court of Appeals went out of its way to give deference to the trial court's opaque "opinion" and Petitioners' complaints in this regard are spurious.

V. The Eighth Circuit's Attorney's Fee Decision Was Consistent With The Decisions Of Other Circuits

Petitioners contend that the Eighth Circuit created a circuit conflict by failing to reduce NFO's appellate attorneys' fee award to reflect relative success on appeal. (CMPC at 27-28.) Here, as elsewhere, Petitioners' factual premise is erroneous, since Petitioners simply ignored the Court's opinion. In fact, citing "*the outcome of the case*" as one of several key factors, the Court reduced NFO's lodestar fee request by approximately $100,000 and denied the requested multiplier (emphasis added). (696 F.2d at 1211; P. App. 5a.) Moreover, in rejecting the identical argument petitioners make here, the Eighth Circuit reiterated that "[W]e have considered the *ultimate outcome* of the appeal in our calculation of the lodestar figure and our refusal to enhance that figure by the suggested 1.5 multiplier." (Emphasis added.) *Id.* at 1212; 6a.

Similarly meritless is Petitioners' further contention that the Eighth Circuit's decision conflicts with decisions of other circuits, principally the Second Circuit. *See*: *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978) and *FLM Collision Parts, Inc. v. Ford Motor*

Co., 411 F. Supp. 627 (S.D.N.Y. 1976), *modified on other grds.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). There is no conflict.[19]

While considering the ultimate outcome on appeal in awarding overall attorney fees, the Eighth Circuit declined to further specifically apportion the award for issues won and lost because the appellate issues were so "interrelated":

> "We do not reach that apportionment question here because the issues raised on the appeal are so interrelated that *we cannot say that any of the services compensated out of this fee award were not part of NFO's success on appeal.*" (696 F.2d at 1212; P. App. 6a) (emphasis supplied).

The *Kane* and *FLM* courts held that activities devoted *solely* to unsuccessful claims were not recoverable, but fully agreed with the Eighth Circuit that to the extent an attorney's work benefitted both successful and unsuccessful claims, that work was *fully compensable*. 439 F. Supp. at 1057; 411 F. Supp. at 633.[20]

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[19] This Court recently granted certiorari in Hensley v. Eckerhart, No. 81-1227 (8th Cir. Sept. 28, 1981) (unpublished), *cert. granted*, 50 U.S.L.W. 3695 (March 3, 1982) in order to address the question of apportionment in cases under 42 U.S.C. § 1988 for clearly segregable attorneys' fees solely attributable to pursuing unsuccessful issues. The result of this Court's decision in *Hensley*, however, will have no bearing on the instant case. Even if the rationale for apportioning fees under § 1988 were found applicable to the Clayton Act, both sides of the apportionment conflict agree that in cases such as this, where the Eighth Circuit found the successful and unsuccessful issues inextricably intertwined, the attorneys' efforts are fully compensable.

[20] The Fourth Circuit's decision in Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 429 U.S. 1097 (1977), which Petitioners also cite as conflicting with the Eighth Circuit's decision in this case, is clearly distinguishable on its facts. The Court of Appeals in *SCM Corp.* refused to overturn a district court decision which had reduced a fee request by apportioning the attorney's efforts between distinct successful and unsuccessful claims. As the Eighth Circuit expressly

Petitioners contend finally that this Court should grant plenary review of the Eighth Circuit's decision to compensate NFO for part of its reasonable appellate litigation expenses under Section 4 of the Clayton Act. Petitioners fail to mention that this case has now dragged on for more than eleven years, and cost the parties millions of dollars in attorneys' fees and related litigation expenses, and that their own conduct is a significant reason for these expenses and delay. The Eighth Circuit found that AMPI's deliberate document destruction and suppression "required extensive additional proceedings to ascertain the scope of suppression and . . . further review by NFO of virtually every aspect of AMPI's involvement in the case." (687 F.2d at 1205; App. 55a) The Eighth Circuit further found that Petitioners planned to "break NFO's back" with litigation expenses. (687 F.2d at 1200; App. 45a) Awarding NFO a portion of its expenses under § 4 of the Clayton Act was both completely reasonable under the extraordinary facts of this case and, in any event, not in conflict with the decisions of other circuits.[21]

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noted, however, the non segregable nature of the issues involved in this case prevented them from ever reaching a similar apportionment question. (696 F.2d at 121; P. App. 6a.)

[21] The Eighth Circuit found NFO equally and fully entitled to a portion of its reasonable expenses under both the "cost of suit" and "reasonable attorney's fee" provisions of § 4 of the Clayton Act. The purported contrary decisions cited by CMPC at 29 refer only to recovering expenses under the "cost of suit" provision. Thus, none of these decisions directly conflicts with the Eighth Circuit's holding that reasonable litigation expenses are recoverable as part of a "reasonable attorney's fee." Moreover, the Eighth Circuit's award of a portion of NFO's appellate litigation expenses, "whether considered part of the 'cost of suit' or part of a 'reasonable attorney's fee'" represents the only logical reading of the Clayton Act and is consonant with the congressional purpose of encouraging private plaintiffs to aid in enforcement of the antitrust laws. Furthermore, as Professor Moore has pointed out, "had Congress intended 'cost of suit' to include only taxable costs it would have said so." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.71 [3] (2d ed. 1982). *Accord* Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d

VI. The Eighth Circuit's Application Of The Capper-Volstead Exemption Was Consistent With The Prior Decisions Of This Court

Petitioners AMPI and Mid-Am claim that NFO had nonfarmer members and that the Eighth Circuit's analysis of NFO's Capper-Volstead exemption conflicts with the decisions of this Court in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978). No review should be granted for three reasons.

First, contrary to Petitioners' claim, NFO has never conceded that it had *any* nonfarmer "members" and the Eighth Circuit did not so find. The Eighth Circuit simply referred to the alleged nonfarmers as "putative" nonfarmer members of NFO, but never definitely resolved this factual issue. The record in this regard consists *solely* of the stipulated contents of a handful of letters whose authors claimed to be nonfarmers in an effort to avoid paying dues. The letters, however, were rank hearsay when offered to *prove* the truth of their contents. There is no other evidence of nonfarmer membership in the relevant time period.

Second, in their claims against NFO, AMPI and Mid-Am solely seek damages resulting from the increased competition created by NFO's entry into milk marketing, and such claims are flatly barred by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The Eighth Circuit said "Although there is support in the record for [NFO's] theory, we need not reach the issue in light of our holding." (687 F.2d at 1188 n.9; App. 20a n.9)

If this Court were to consider reversing the Eighth Circuit's Capper-Volstead holding it would first be com-

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1087, 1100 (5th Cir. 1982); Pitchford Scientific Inst. Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

pelled to resolve each of the above two intensely factual issues that the Eighth Circuit never had to reach. Fact-finding, of course, is not this Court's province; moreover, if either issue were resolved in NFO's favor, Petitioners' whole Capper-Volstead argument would be moot. Thus, this matter is not appropriate for review.

Finally, on the merits, the Eighth Circuit's decision was fully consistent with prior decisions of this Court. The Capper-Volstead Act, 7 U.S.C. § 291, was intended to protect the right of farmers to collectively market their products. *See Case-Swayne*, *supra*, 389 U.S. at 391-393. Petitioners have fastened on some language in *National Broiler*, *supra*—a case in which farmers marketed collectively with non-farmers—and seek to extract from it a ruling that NFO's collective marketing activities were unlawful, even though no non-farmers were involved in any collective marketing.

Petitioners' argument, that receipt of twenty-five dollars in "dues" from a handful of individuals is the same as shielding middlemen from price fixing liability, completely ignores the relevant economic facts underlying this Court's prior Capper-Volstead decisions. For example, in *Case-Swayne*, this Court held that Sunkist was not a Capper-Volstead cooperative where its membership included nonproducers—"private corporations and partnerships, owning and operating packing houses for profit" (398 U.S. at 287)—and these private packing houses actively participated in Sunkist's control and policy making and directly enlarged Sunkist's market share.

In marked contrast to the nonproducers in *Case-Swayne*, the purported [22] nonfarmer members of NFO

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[22] As noted above, NFO has never conceded that it had any nonfarmer "members" and the Eighth Circuit did not so find. The Eighth Circuit noted that the "*putative*" nonfarmer members of NFO included: a car dealer, a truck driver, a fertilizer salesman, a school teacher, a retired farmer, a TV salesman and a telephone company employee. (687 F.2d at 1186; App. 17a.) The Court further observed that many of these alleged nonfarmers *never con-*

were never even alleged to have engaged in any collective marketing activities nor to have participated in NFO affairs. The most they could be said to have done was the contribution of dues. It is precisely that kind of nonproducer involvement which this Court found the Capper-Volstead Act contemplated:

> It was recognized, for example, that producers who desired to organize for collective marketing might not have, at the outset, the necessary finances to do so, and might therefore seek capital from nonproducers. (Legislative history citations omitted.)

(*Id.* at 395 n.13.)

In *National Broiler*, this Court denied Capper-Volstead status to the National Broiler Marketing Association because it had nonfarmers—large integrated agribusiness corporations—directly participating in the collective processing and marketing of broilers. The Court said that these firms were "indistinguishable" from the type of commercial packers and processors Congress did not want to protect, and held that such involvement by even one such nonfarmer entity would result in a loss of Capper-Volstead immunity. Just as in *Case-Swayne*, participation by commercial nonproducer entities in collective pricing and marketing activities destroyed any claim to a Capper-Volstead exemption.

In this case, however, the Eighth Circuit expressly found that "There is no suggestion here that dairy industry processors were members of NFO." (687 F.2d at 1186; App. 17a.) To the contrary, it is undisputed that all persons participating in the collective pricing and marketing of NFO milk were dairy farmers. (*Id.* at 1185; 15a.) Indeed, NFO's bylaws prohibited any non-

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sidered themselves NFO members and that "When they received dues' billings, they typically wrote of having made 'donations' to 'help get things started' and of not wanting to continue doing so." *Id.*

farmer from asserting any membership interest.[23] The record evidence shows that the alleged NFO nonfarmer members did not vote in NFO elections, did not attend NFO meetings or conventions and were not involved in any phase of the milk business; they were thus "members" in name only, functioning at most simply as capital contributors, a nonfarmer role explicitly approved in *Case-Swayne*.

This Court's decisions in *Case-Swayne*, *supra*, and *National Broiler*, *supra*, do establish that nonfarmers are not permitted to drag their activities under the tent of the Capper-Volstead exemption. These cases do not, however, establish a mechanistic "nonfarmer" rule to be applied without regard to the economic facts of the case, nor do they hold that a validly formed and operated cooperative loses its exemption, when it inadvertently attempts to collect dues from a fertilizer salesman or a schoolteacher. The rule urged by Petitioners seems to be that Capper-Volstead qualification should depend not on whether those acting collectively are farmers, but rather on the number and enthusiasm of clerical personnel employed by the cooperative. If this were the law it is doubtful that any large farmer group in the United States could qualify for Capper-Volstead status. Moreover, as the Eighth Circuit recognized "it would be cruelly ironic to exempt large Co-ops like Mid-Am and AMPI—professionally managed and operated by many nonfarmers—while denying exemption to the farmers who banded together in NFO." (687 F.2d at 1187; App. 28a.)

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[23] The Eighth Circuit stated "Moreover, NFO complied with the requirement that nonfarmers be excluded from membership by adopting bylaws in 1970 which make clear that any member who quits farming 'shall automatically cease to be a member and his or her membership agreement shall become null and void'." (Footnote omitted.) (687 F.2d at 1185; App. 15a.)

CONCLUSION

For all of the above reasons, AMPI's, Mid-Am's and CMPC's Petitions for a Writ of Certiorari should be denied.

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Nos. 82-1585, 82-1586, and 82-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

MID-AMERICA DAIRYMEN, INC.,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT REPLY BRIEF OF THE PETITIONERS ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN, INC. AND CENTRAL MILK PRODUCERS COOPERATIVE

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JOINT REPLY BRIEF OF THE PETITIONERS ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN, INC. AND CENTRAL MILK PRODUCERS COOPERATIVE

I. Respondent's Arguments Reinforce The Conflict Among The Circuits Concerning Need To Prove Relevant Market

Respondent National Farmers' Organization ("NFO") is attempting to rationalize the Eighth Circuit's decision based upon a *per se* theory of illegality, which NFO never urged before the trial court, and which the Eighth Circuit flatly rejected.[1] Opposition Brief of NFO at 6-8 (hereinafter "Opposition Br."). At the same time, NFO would lead this Court to believe that the Eighth Circuit's *de novo* finding of a Sherman Act violation was really predicated on a *per se* analysis of § 1 of the Act and that the Eighth Circuit's § 2 analysis was merely an afterthought and, thus, superfluous. Opposition Br. at 11. On the contrary, the Eighth Circuit's analysis dealt entirely with a § 2 conspiracy to monopolize, after it concluded that NFO's inadequate relevant market proof could not sustain actual or attempted monopolization claims under § 2. 687 F.2d at 1192; A.29a. This § 2 finding was then automatically converted into a § 1 "rule of reason" violation. In short, NFO's contorted hypothesis turns the Eighth Circuit's decision on its head and clearly reflects a deep-seated recognition that the decision cannot be justified within the framework of any meaningful analysis of the competitive market.

The Eighth Circuit's expansive interpretation of § 2 is erroneous and stands out as bad antitrust policy. The decision holds

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[1] NFO's suggestion that the court of appeals' decision somehow was a *per se* holding, without "the talismanic phrase, *per se*", overlooks the fact that NFO strenuously, but unsuccessfully, urged the court to adopt this *per se* approach. 687 F.2d at 1193; A.30a. Furthermore, the court's failure to use the term *per se* preceding "unreasonable" could not have been inadvertent. The court was able to recognize a *per se* violation and specifically applied that label to the price-fixing conduct of NFO. 687 F.2d at 1184; A.12a.

that proof of "relevant market" is not required to establish either § 2 conspiracy to monopolize claims or § 1 "rule of reason" claims. Under that rationale, business torts, irrespective of economic or competitive effect, could be converted into violations of § 2 and § 1. Although there is absolutely no basis for NFO's strained contention that the court of appeals' decision amounted to a *per se* finding, this very interpretation suggests the potential for mischief and highlights the importance of review by this Court.[2]

Respondent ignores the clear language of § 2 and contends that there is no circuit conflict on the need to prove relevant market in § 2 conspiracy to monopolize cases. In an attempt to distinguish away the clear conflict, NFO argues that the cases relied upon by petitioners "involved ordinary rule of reason-type offenses that had ambiguous competitive significance unless analyzed in a structural setting." Opposition Br. at 8.[3] First, NFO forgets that this case too involves the "rule of reason." Second, the fallacy of its position is rather clearly

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[2] There could be no basis for adopting a *per se* approach to activities involved in this case because the courts have had insufficient experience to condemn the subject conduct as *per se*, especially where it takes place within the complex and highly regulated dairy industry. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 7-11 (1979). We are aware of no reported case that has applied the *per se* rule to unilateral or joint conduct of agricultural cooperatives.

[3] NFO attempts to circumvent the importance of relevant market proof by repeatedly applying the "predatory" label to petitioners' conduct. Opposition Br. at 2-5, 6-8. Significantly, NFO ignores the definition of "predation" utilized by the court of appeals in assessing the nature of the conduct at issue. The Eighth Circuit included within the concept of "predation" conduct which is "merely 'anticompetitive' " irrespective of whether it is economically justified. 687 F.2d at 1183; A.10a. Thus the Eighth Circuit clearly misapplied the principle that an agricultural cooperative may lawfully intend to and "willfull[ly]" acquire or maintain monopoly power. *See Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

exemplified by *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), one of the conflicting cases cited by petitioners. AMPI Petition at 14; Mid-Am Petition at 11. In that case, the Fifth Circuit required relevant market proof for a § 2 conspiracy claim and a § 1 "rule of reason" claim where the conduct at issue included commercial bribery, theft of trade secrets, and spurious lawsuits.

Respondent's reliance on the aberrational rule of the Ninth Circuit in *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), highlights the conflict among the circuits. The rationale of that case is fundamentally at odds with this Court's interpretation of § 2 attempt to monopolize cases and that of virtually every other circuit. AMPI Petition at 11 n.6. That decision can provide no solace to respondent unless it expects this Court to ignore its holdings in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) (relevant market essential in § 2 attempt to monopolize claims), and *Times Picayune Publ. Co.* v. *United States*, 345 U.S. 594, 615 (1953) (relevant market essential in § 1 "rule of reason" claims).

NFO's reliance on *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), is equally misplaced. That case clearly conflicts with decisions in the Fourth, Fifth and Eleventh Circuits and conflicts in principle with Third and District of Columbia Circuit authorities. AMPI Petition at 14; Mid-Am Petition at 11-13. Respondent's reliance on *Hunt-Wesson* and *Consolidated Laundries* reinforces, rather than negates, the existence of a wide-spread circuit conflict. There is no precedent in this Court, and NFO cites none,[4] that rele-

[4] Contrary to NFO's suggestion, *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), did not hold relevant market proof unnecessary in § 2 conspiracy cases. Opposition Br. at 9 n.5. The analysis at issue simply dealt with the amount of interstate commerce necessary to sustain jurisdiction.

vant market proof is not essential to prove a § 2 conspiracy violation. Such "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).[5] Because of the conflict, and the necessity for a definitive declaration of Sherman Act policy by this Court, *certiorari* should be granted.

II. NFO's Damage Claim For Lost Membership Dues Does Not Arise "By Reason Of" The Alleged Restraint In The Market For Sale Of Raw Milk

NFO's Opposition Brief elides the difference, recognized by the Eighth Circuit, between its *members'* competitive injury in the form of "price reduction" damages, and NFO's "loss of dues" damages resulting from its alleged failure to attract and retain members. 687 F.2d at 1208-09; A. 62a-63a.[6] Claiming that "NFO competes with Petitioners for members and customers," (Opposition Br. at 13) NFO argues that as a "competitor," its standing is clear. *Id.* The basic flaw in this contention is that NFO improperly shifts the entire focus of its proffered antitrust violations—competition in the sale of milk—to an entirely different framework—competitition for membership—in order to justify standing. This it cannot do. The competitive milieu cannot be one thing for determining whether a violation exists and yet another for determining whether a plaintiff has standing to recover certain damages. Second, and even more important, respondent ignores the

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[5] NFO masks the fact that the appellate court, as well as NFO, specifically focused only upon the impact to NFO. If "competition" had been a serious concern, there would have been an assessment of the number of competitors, and the extent of competition, within a relevant market. Indeed, NFO concedes that the level of petitioners' market shares, a threshold inquiry to assess market power and effect upon competition, was "unresolved." Opposition Br. at 11 n.6 (continued).

[6] The Eighth Circuit held that NFO lacks standing to sue for price reduction damages suffered by its members. 687 F.2d at 1208-09; A.62a.

independent ground for denying standing to recover lost membership dues as stated in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ___ U.S. ___, 103 S. Ct. 897 (1983). There, this Court held that the Union lacked standing to recover lost dues as antitrust damages under § 4 of the Clayton Act:

> If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries . . .

Id. at 910 n.46.

Here as in *Associated General Contractors*, "the tenuous and speculative character of the relationship between the alleged [reduced price received by NFO's members] and [NFO's] alleged [loss of dues] . . . and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of [NFO's] antitrust claim." *Id.* at 913.

NFO's damage claim for lost membership dues describes a claim based upon a restraint in the "market" for collective bargaining and political representation services rather than competitive injury from an unlawful restraint in the milk sales market. Such a claim is of no concern to the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). Here, as in *Associated General Contractors*, "the remote and obviously speculative character of that harm [alleged by NFO] is plainly sufficient to place it beyond the reach of § 4." 103 S. Ct. at 912 n.52.[7] Respondent's contentions

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[7] As explained in CMPC's Petition at 11, there is no direct relationship between dues paying membership in NFO and the marketing of milk through NFO's collective bargaining program.

do not detract from the importance of establishing the independent principle that lost membership dues are too speculative to confer antitrust standing upon membership organizations—union or otherwise.

III. Exempt Joint Conduct Was The Linchpin Of The Eighth Circuit's Finding Of A Conspiracy

At the outset it should be noted that respondent concedes, albeit grudgingly, that "exempt joint conduct comprised only a tiny portion" of the Eighth Circuit's finding of a conspiracy. Opposition Br. at 19 n.13. Although NFO constantly refers to "pervasive evidence" of a conspiracy, it cites no evidence other than exempt joint conduct. The unalterable fact is that the Eighth Circuit relied upon a great deal more than just a "tiny portion" of exempt joint conduct to infer the existence of a conspiracy.

The only bases for the existence of a conspiracy articulated by the court of appeals were: (1) joint marketing activities exempt under the Capper-Volstead Act; and (2) joint attempts to influence state and federal governments, which were held exempt under the *Noerr-Pennington* doctrine. 687 F.2d at 1195; A. 34a-35a.[8]

In an effort to obscure the point, respondent refers to exhibits not even mentioned or considered by the court of appeals as evidence of a conspiracy. Opposition Br. at 18 n.12.[9] NFO

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[8] The so-called "boycotts, milk supply cut-offs, short-shipping, discriminatory pricing, bad faith litigation and threats of litigation" alluded to by respondent were not joint or concerted acts, as the Eighth Circuit itself recognized. 687 F.2d at 1194; A.32a.

[9] Although NFO refers to the October 19, 1970 meeting as evidence of joint conduct, it does not contest that this meeting constituted *exempt* joint conduct involving an exercise of First Amendment rights and exploring the possibility of petitioning states' attorneys general concerning NFO's cooperative qualification. *See* AMPI Petition at 19 n.18. The remaining exhibits cited by NFO do not even reflect joint conduct of any form.

then warns this Court that it must engage in a *de novo* review of the underlying record if it decides to re-examine the Eighth Circuit's decision. *Id.* No such review is required since the Eighth Circuit's clear reliance on exempt joint conduct as the predicate for conspiracy raises a straightforward legal issue of major importance.[10]

Contrary to respondent's assertion (Opposition Br. at 19 n.13), petitioners *do* urge that the Eighth Circuit's decision directly conflicts with this Court's decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671 (1965). AMPI Petition at 20-21. We reiterate that the Eighth Circuit misinterpreted the crux of this Court's *Pennington* holding that an unlawful conspiracy finding cannot be predicated *solely or in part* upon exempt conduct. *Id.* The Eighth Circuit improperly relied upon exempt joint conduct to infer a conspiracy.

NFO's contention that litigation and threats of litigation were in themselves joint conduct, which is clearly unsupportable, belies its claim that exempt joint conduct was only a "tiny portion" of the conduct relied upon by the court of appeals. That may explain NFO's unwillingness to even respond to another important aspect of the Eighth Circuit's erroneous application of the *Noerr-Pennington* exemption. The Eighth Circuit's decision precludes application of the exemption based on an erroneous competitor-customer distinction relating to litigation and threats of litigation. The Constitutional policies incorporated in the *Noerr-Pennington* exemption and the sound application of these policies protect litigation and threats of litigation whether directed at a competitor or customers of a competitor. AMPI Petition at 23-24. This error raises an important legal issue which, unless corrected, will lead to an erosion of the *Noerr-Pennington* exemption.

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[10] Respondent's perception of this Court's standard of review is premised upon, and is testimony to, the rather sweeping *de novo* appellate fact-finding engaged in by the Eighth Circuit.

IV. The Court Of Appeals Usurped The Fact-Finding Function Of The Trial Court

Respondent's retort to the Rule 52(a) argument is that the Eighth Circuit "went out of its way to give deference to the trial court's opaque 'opinion'." Opposition Br. at 21. If the trial court's fact-findings were "opaque," as NFO contends, then it is remarkable, to say the least, that NFO urged the appellate court to use those very findings as a basis for its *de novo* review. While arguing on appeal that the trial court's findings of fact were clear enough to establish its claimed antitrust violations, NFO simultaneously argued that the trial court itself failed to comply with Rule 52(a).

The Eighth Circuit's decision is clear appellate fact-finding in derogation of Rule 52(a). The court of appeals unabashedly drew numerous inferences of intent, weighed conflicting testimony and made credibility determinations to reach factual conclusions diametrically opposed to those found by the trial court. AMPI Petition at 24-29. To say that the appellate court accorded "remarkable" "deference" to the trial court, because the appellate court did not rewrite *all* of the trial court's findings of fact, is a rather facile attempt to obscure the basic issue. Opposition Br. at 20.

The Eighth Circuit usurped the trial court's function and, despite the disclaimers, conducted a *de novo* review fundamentally at odds with this Court's decisions in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S. Ct. 1781, 1790 (1982), *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-96 (1950), and *United States* v. *Yellow Cab*, 338 U.S. 338, 341 (1949).

V. The Eighth Circuit Erroneously Refused To Apply This Court's Decision In *National Broiler Marketing Ass'n* To This Case.

The Eighth Circuit found that NFO had engaged in a *prima facie, per se* Sherman Act price fixing violation, but held that such conduct fell within the Capper-Volstead Act antitrust

exemption. 687 F.2d at 1184; A. 12a-13a. The court of appeals applied the exemption to NFO's conduct, despite the existence of NFO's non-farmer members, on the following grounds: (1) the court refused to *retroactively* apply the *National Broiler* rule that even one "non-farmer" member defeats the exemption, 687 F.2d at 1187; A. 17a-18a; (2) the court modified the *National Broiler* rule to permit non-farmer members provided they were not "middlemen." 687 F.2d at 1186; A. 16a-17a. Instead of addressing these issues, NFO simply reargues the evidence and lamely suggests that the appellate court never found that NFO had non-farmer members during the period in question. Contrary to NFO's contention, the appellate court agreed with the trial court's findings that NFO *did* have non-farmer members during this period. 510 F. Supp. at 426; A. 155a; 687 F.2d at 1185-87; A. 14a-18a.

This case squarely presents two straightforward legal issues: (1) whether the *National Broiler* rule means what it says—the existence of even one non-farmer member vitiates the Capper-Volstead Act exemption; and (2) whether the 1978 *National Broiler* decision has retroactive application.

Resolution of these issues is essential to clarify the scope and meaning of the Capper-Volstead exemption and guide the hundreds upon hundreds of agricultural cooperatives that must conform their operations to the proper legal standards.

VI. The Eighth Circuit's Award Of Costs And Attorneys' Fees Conflicts With Holdings In Other Circuits

Respondent's assertion that the Eighth Circuit's award of certain "expenses" does not conflict with the decisions of other circuits is wrong. Opposition Br. at 23. Indeed, the Eighth Circuit explicitly recognized a circuit split on whether the language of Clayton Act § 4 encompasses an award of expenses beyond those normally considered as statutory costs. *See* P. App. B at 7a, *comparing State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855, 866 (7th Cir. 1981) *with Copper Liquor, Inc.* v. *Adolph Coors Co.*, 684 F.2d 1087, 1100-1101 (5th Cir. 1982). The Eighth Circuit chose to align itself with the "liberal interpretation" of the Fifth Circuit, and clearly ac-

knowledged the existence of conflicting authority.[11] P. App. B at 7a. NFO never even alluded to the conflict among the circuits on this issue.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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[11] Although the Eighth Circuit cited only *Sangamo Construction, supra*, several other courts have held certain expenses to be nontaxable costs of litigation. *See* CMPC Petition at 29 n.37.